Supreme Court, U.S.
FILED

981038 DEC 22 1998

OFFICE OF THE CLERK

No. 98-____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

ROLF LARSEN,

Petitioner,

v.

ROY C. AFFLERBACH, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Cletus P. Lyman*
Michael S. Fettner
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040

* *Counsel of Record*

142 pp

QUESTIONS PRESENTED

1. Are state senators entitled to absolute legislative immunity, including from prospective relief, when they conduct evidentiary hearings and vote on articles of impeachment against a state supreme court justice, on claims under 42 U.S.C. § 1983, that they violated the former justice's rights under the First and Fourteenth Amendments of the U.S. Constitution, when they convicted him on one Article of Impeachment, removed him from office, and barred him from holding any office of trust or profit under the Commonwealth?

2. What is the extent of constitutionally protected interests under the Due Process Clause of the Fourteenth Amendment in the elected office of Justice of the Supreme Court of Pennsylvania?

PARTIES TO THE PROCEEDINGS

Petitioner is plaintiff Rolf Larsen, former justice of the Supreme Court of Pennsylvania.

There were five groups of defendants in the district court:

Senate of the Commonwealth of Pennsylvania, and Senators Roy C. Afflerbach, Anthony B. Andrezeski, Gibson E. Armstrong, Earl Baker, Albert V. Belan, Clarence D. Bell, Leonard J. Bodack, Michael E. Bortner, David J. Brightbill, J. Doyle Corman, Michael M. Dawida, Michael B. Fisher, Vincent J. Fumo, Stewart J. Greenleaf, Melissa A. Hart, David W. Heckler, Edward W. Helfrick, Edwin G. Holl, Roxanne H. Jones, Robert C. Jubelirer, Gerald J. LaValle, Charles D. Lemmond, Jr., H. Craig Lewis, J. William Lincoln, F. Joseph Loeper, Roger A. Madigan, Bruce S. Marks, Robert J. Mellow, Harold F. Mowery, Jr., Raphael J. Musto, Michael A. O'Pake, Frank A. Pecora, John E. Peterson, Eugene E. Porterfield, Terry L. Punt, Jeanette F. Reibman, James J. Rhoades, Robert D. Robbins, Frank A. Salvatore, Allyson Y. Schwartz, Tim Shaffer, John J. Shumaker, Patrick J. Stapleton, William J. Stewart, J. Barry Stout, Richard A. Tilghman, Jack Wagner, Noah W. Wenger, and Hardy Williams.

The Supreme Court of Pennsylvania and Justices Robert Nix, John Flaherty, Stephen Zappala, Nicholas Papadakos, Ralph Cappy, Frank Montemuro, and Ronald Castille.

The Court of Judicial Discipline and members Joseph F. McCloskey, William F. Burns, Dawson R. Muth, Peter DePaul, Carol K. McGinley, Christine L. Donohue, Justin M. Johnson and William Cassenbaum.

The Judicial Conduct Board and members Joseph A. Del Sole, Gerard P. Egan, Arthur J. Edmunds, Diane M. Edmundson, John W. Herron, Frederick Wells Hill, Esquire, Sister Matthew Anita MacDonald, Gerald J. O'Connor, Andrew Palm, Charles W. Rubendall, II, James E. Russo, Bernard C. Watson, William J. Arbuckle, III, Bruce A. Antkowiak, and Thomas A. Bergstrom.

Administrative Office of Pennsylvania Courts, Nancy M. Sobolevitch, Court Administrator of Pennsylvania, and David A. Frankforter, Manager of Human Resources of the Court Administrator of Pennsylvania.

Respondents on this petition are in the first group of defendants only, the Senators of the Commonwealth of Pennsylvania. The Senate, the Supreme Court of Pennsylvania, the Court of Judicial Discipline and its members, and the Judicial Conduct Board and its members, were dismissed from the action by the district court on February 28, 1997. The Administrative Office was dismissed from the action on May 29, 1997.

On February 28, 1997, the district court denied the motions to dismiss on grounds of qualified immunity Mr. Larsen's claims against the justices, Ms. Sobolevitch and Mr. Frankforter. The court of appeals affirmed in part and reversed in part. *Larsen v. Senate*, 154 F.3d 82 (3d Cir. 1998). The justices, Ms. Sobolevitch and Mr. Frankforter filed a petition for writ of certiorari in this court, No. 98-988.

Counsel for respondents are:

Arlin M. Adams and Michael J. Barry
SCHNADER HARRISON SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, PA 19103

Morey M. Myers
MYERS, BRIER & KELLY
108 North Washington Avenue, Suite 700
Scranton, PA 18503

Counsel for defendants in the district court, not named as respondents here, appear below. They have no interest in these proceedings.

LeRoy S. Zimmerman and James J. Kutz
ECKERT SEAMANS CHERIN & MELLOTT
213 Market Street
Harrisburg, PA 17101
Counsel for Court of Judicial Discipline defendants.

W. Thomas McGough, Jr., and Pamina G. Ewing
REED SMITH SHAW & McCLAY
435 Sixth Avenue
Pittsburgh, PA 15219
Counsel for Judicial Conduct Board defendants.

Arthur G. Raynes and Stephen E. Raynes
RAYNES McCARTY BINDER ROSS & MUNDY
1845 Walnut Street, Suite 2000
Philadelphia, PA 19103
Counsel for Administrative Office defendants

Statement under Rule 29.6:

None of the parties to these proceedings is a corporation.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Table of Authorities v

Preliminary Statement 1

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 2

Statement of the Case 3

Statement of Facts 3

Procedural History 11

Reasons for Granting Writ 13

Conclusion 29

Appendix:

9/23/98, order A1
8/28/98, order A4
8/11/98, judgment A8
8/11/98, decision A12
8/18/97, order A41
5/29/97, decision A43
2/28/97, order A54
7/15/96, motion A129
7/15/96, statement A131
2/26/96, amended complaint excerpts A135

TABLE OF AUTHORITIES

Cases:

Adams v. Supreme Court of Pa.,
502 F.Supp. 1282 (M.D.Pa. 1980) 25

Addington v. Texas, 441 U.S. 418 (1979) 28

Board of Regents v. Roth, 408 U.S. 564 (1972) . . . 19

Bogan v. Scott-Harris, 118 S.Ct 597 (1998) 13,16

Bond v. Floyd, 385 U.S. 116 (1966) 13,16

Brown v. Griesenauer, 970 F.2d 431
(8th Cir. 1992) 13,14

Chastain v. Sundquist, 833 F.2d 311
(D.C.Cir. 1987) 18

Cleveland Bd. of Ed. v. Loudermill,
470 U.S. 532 (1985) 19

Ex parte McCarthy, 1 K.B. 256 (1923) 29

Forrester v. White, 484 U.S. 219 (1988) 13,16

Gilbert v. Homar, 117 S.Ct. 1807 (1997) 19

Gravel v. U.S., 408 U.S. 606 (1972) 17

Hastings v. U.S., 802 F.Supp. 490 (D.D.C. 1992) . 27

Heller v. Doe, 509 U.S. 312 (1993) 28

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 18

In re Ruffalo, 390 U.S. 544 (1968) 28

Joint Anti-Fascist League v. McGrath,
341 U.S. 123 (1951) 29

Larsen v. Senate,
166 Pa.Cmwlth. 472, 646 A.2d 694, 705 (1994) . . 15

Larsen v. Senate, 955 F.Supp. 1549
(M.D.Pa. 1997) 1,12

Larsen v. Senate, 965 F.Supp. 607
(M.D.Pa. 1997) 1,12

Larsen v. Senate,
152 F.3d 240 (3d Cir. 1998). 1,14,15,16,17,18,19

Linsenmeyer v. Straits,
402 Pa. 7, 166 A.2d 18 (1960) 25

Marbury v. Madison, 1 Cranch 137 (1803) 20

Mathews v. Eldridge, 424 U.S. 319 (1976) 26

Matters of Judges Glancey and Chiovero,
515 Pa. 201, 527 A.2d 997 (1987) 20

Morgan v. U.S., 298 U.S. 468 (1936) 28

Offutt v. U.S., 348 U.S. 11 (1954) 29

Perry v. Sindermann, 408 U.S. 593 (1972) 29

Powell v. McCormack, 395 U.S. 486 (1969) 18

Speiser v. Randall, 357 U.S. 513 (1958) 27

Stretton v. Disciplinary Board,
944 F.2d 137 (3d Cir. 1991) 25

Tenney v. Brandhove, 341 U.S. 367 (1951) 16

U.S. v. Brewster, 408 U.S. 501 (1972) 18

U.S. v. Lovett, 328 U.S. 303 (1946) 19

Walker v. Jones, 733 F.2d 923 (D.C.Cir. 1984) . . . 18

Wisconsin v. Constantineau, 400 U.S. 433 (1971) . . 20

Yamaha Motor Corp. v. Calhoun,
116 S.Ct. 619 (1996) 12

Yohn v. Love, 887 F.Supp. 773 (E.D.Pa. 1995) . . . 11

Yohn v. Love, 76 F.3d 508 (3d Cir. 1996) 11

U.S. Constitution:

U.S. Constitution, First Amendment 2

U.S. Constitution, Fourteenth Amendment 2

U.S. Statutes:

28 U.S.C. § 1343(a)(3) 2

42 U.S.C. § 1983 3

Pennsylvania Constitution:

Article V, § 15. 22,23,24,25

PA Rules and Codes:

Code of Judicial Conduct 26

Other Authorities:

ABA Report of the Commission on Separation of Powers and Judicial Independence, July 4, 1997 . 24

Bouvier's Law Dictionary, Baldwin's Century Edition (Cleveland 1948) 22

Eastman, *Courts and Lawyers of Pennsylvania* (1922) 21

Himes, *Life and Times of Judge Thomas Cooper* (Carlisle, Pa. 1918) 22

Pa. Legislative Journal -- Senate, October 4, 1994 . 15

Rehnquist, *Grand Inquests* (New York, 1992) 21

Reinstein & Silverglate, *Legislative Privilege and Separation of Powers*, 86 Harv.L.Rev. 1113 (1973) 18

Woodside, *Pennsylvania Constitutional Law* (1985) . 15

Wright & Miller, *16 Fed. Prac. & Proc.* § *3929* (1996) 12

PRELIMINARY STATEMENT

Petitioner Rolf Larsen hereby petitions the court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered August 11, 1998, in appeal Nos. 97-7296 and 97-7451 [A8], remanding the cause to the United States District Court for the Middle District of Pennsylvania with instruction to dismiss all of Mr. Larsen's claims against the Senators of the Commonwealth of Pennsylvania, and deciding not to address whether Mr. Larsen possessed a constitutionally protected property interest in his elected position as justice of the Supreme Court of Pennsylvania or the extent of that interest.

OPINIONS BELOW

The opinion of the court of appeals is reported at 152 F.3d 240 (3d Cir. 1988)[A12-A40]. Opinions of the district court are reported at 955 F.Supp. 1549 (M.D.Pa. 1997) [A54] and at 965 F.Supp. 607 (M.D.Pa. 1997)[A43].

JURISDICTION

This court has jurisdiction over this case under 28 U.S.C. § 1254(1), because it involves review of a judgment of the U.S. Court of Appeals for the Third Circuit.

The court of appeals had jurisdiction over the district court's partial denial of Senators' claim to absolute legislative immunity, under 28 U.S.C. § 1291, and the collateral order doctrine. The court of appeals had jurisdiction by permission over the district court's denial of the Senators' motion to dismiss on the ground of lack of protected interest under the Fourteenth Amendment, under 28 U.S.C. § 1292(b) and Rule 5, F.R.A.P.

The district court had jurisdiction under 28 U.S.C., § 1331, providing jurisdiction over cases involving federal questions, and 28 U.S.C., § 1343 and 42 U.S.C., § 1983, providing jurisdiction over cases involving civil rights and violations of the Constitution of the United States.

The judgment of the court of appeals was entered August 11, 1998 [A8]. The order denying petitioner's timely motion for rehearing was entered September 23, 1998 [A1].

STATUTORY PROVISIONS INVOLVED

U.S. Constitution, First Amendment:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, Fourteenth Amendment:

"Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law;

* * *

"Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

28 U.S.C. § 1343(a)(3):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . to redress the deprivation, under color of any

State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress . . .

42 U.S.C. § 1983:

"Every person who under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . "

STATEMENT OF THE CASE

Nature of Action

This is an action by a former justice of the Pennsylvania Supreme Court against state Senators, seeking, among other things, declaratory and injunctive relief, voiding the Senate impeachment verdict of guilty, removal from office, and bar from holding any office of trust or profit under the Commonwealth.

Statement of Facts

In November 1973, Mr. Larsen was elected to a ten-year term as a judge on the Court of Common Pleas, Allegheny County, Pennsylvania, and served there from January 1974 to January 1978.

In November 1977, Mr. Larsen was elected to a 10-year term as a justice on the Supreme Court of Pennsylvania. In

November 1987, Mr. Larsen won a retention election for a 10-year term beginning in January 1988.

As of June 1994, Mr. Larsen was in the seventh year of his term and next in line to be Chief Justice of Pennsylvania.

On October 14, 1992, the Supreme Court of Pennsylvania, by Justices Zappala and Cappy, with Justice Papadakos dissenting, in a disciplinary matter involving allegations of a meeting with a lower court judge about a pending case, issued a per curiam order without opinion, reprimanding Mr. Larsen, but finding he acted without improper motive. *Matter of Larsen*, 532 Pa. 326, 616 A.2d 529 (1992).

On November 24, 1992, Mr. Larsen filed and served his petition for reargument and disqualification or recusal of Justices Zappala and Cappy. Mr. Larsen filed and served supplemental and second supplemental petitions on December 14, 1992, and January 7, 1993, respectively. The petitions (among other things) alleged relevant acts of impropriety by Justices Zappala and Cappy.

The petitions also alleged (among other things) acts of impropriety by Chief Justice Nix, including that he improperly interfered in the pending trial in *Commonwealth of Pennsylvania v. David Lee Yohn*, and that the Supreme Court improperly handled Yohn's petition for allowance of appeal over the course of three and one-half years, eventually denying Yohn's petition.

The petitions also alleged that, despite the obvious improper behavior of Chief Justice Nix, no investigation was undertaken or charge made against Chief Justice Nix.

In January 1993, Rep. Christopher K. McNally filed a Petition in the Pennsylvania House of Representatives ("House"), calling for Mr. Larsen's impeachment, and accusing him of violations of the Code of Judicial Conduct.

On June 23, 1993, the Senate adopted Article X of the Rules of Practice and Procedure in the Senate when sitting on Impeachment Trials.

Article X established the Senate Impeachment Committee ("the Committee"), a committee of six Senators, each of whom would be appointed by the President Pro Tempore, to conduct evidentiary hearings by examining documents and listening to live testimony.

On November 23, 1993, the House adopted House Resolution No. 205, authorizing its judiciary committee to investigate conduct allegedly committed by Mr. Larsen. After public hearings and investigation, the judiciary subcommittee on courts issued a report and recommendation.

On April 22, 1994, the House subcommittee on courts recommended to the entire House a resolution to impeach Mr. Larsen.

On May 18, 1994, House Resolution 324 was introduced, listing seven Articles of Impeachment.

On May 24, 1994, the House adopted Resolution 324.

On June 6, 1994, the Senate received the Articles of Impeachment from the House Managers, and passed a resolution, appointing an impeachment committee.

Sometime in June 1994, pursuant to Article X, Senator

Robert C. Jubelirer, President Pro Tempore of the Senate, appointed to the Committee, Senators Stewart J. Greenleaf, chairman, and Charles D. Lemmond, Jr., H. Craig Lewis, Jeannette F. Reibman, Tim Shaffer and Hardy Williams.

On June 20, 1994, Mr. Larsen filed an answer with new matter to the Articles of Impeachment. Mr. Larsen was represented by William C. Costopoulos, Esquire.

On June 30, 1994, Mr. Larsen filed a motion with the Senate, to dismiss for various reasons and to hold the proceedings before the full Senate, rather than before the Committee.

The motion also requested a hearing before the full Senate on discovery, payment of attorneys fees and costs, refusal of certain senators, and a continuance.

On August 8, 1994, Mr. Larsen filed numerous motions.

Additionally, Mr. Larsen requested a hearing in order to establish political contributions between senators and adverse witnesses, ex parte communications between senators and adverse witnesses and receipts of Legislative Initiative Grants from senators to adverse witnesses. Such grants, known as "Walking Around Money," or "WAMS," are highly sought after discretionary funds awarded directly by individual senators to whomever they want, and are used by each party's leadership to maintain voting discipline among the other senators.

Senator Greenleaf described the proceeding before the committee as "evidentiary hearings."

The Committee denied all of the above motions in

advance of the evidentiary hearings.

On August 8, 1994, while the Senate was not in session, the Committee began evidentiary hearings on the Articles of Impeachment. The hearings took place in the Senate chamber in the Capitol.

Evidentiary hearings were held on 17 separate days, on August 8-11, 15-19, 22, 24, 25, 29, 30, and September 7-9, 1994, concluding on September 9, with Mr. Larsen's testimony.

The evidentiary hearings were conducted before the six members of the Committee, presided over by Senator Greenleaf.

On September 9, 1994, after the conclusion of the evidentiary hearings, the Committee gave a tentative schedule that outstanding motions, including all pre-hearing motions, would be argued and decided by the full Senate on September 20, 1994; that closing arguments would be given on September 26, 1994; and, that the Senate would consider and vote on the Articles of Impeachment the day after closing arguments, that is, on September 27, 1994.

After the conclusion of the evidentiary hearings, Mr. Larsen renewed his motions for an evidentiary hearing on the recusal of certain senators, and to establish rules of procedure, including as to the admissibility of evidence and burdens of proof.

On September 19, 1994, the Senate reconvened after its summer break.

On September 20, 1994, the full Senate heard arguments,

and without debate, voted to deny all of the motions above.

On September 27, 1994, the full Senate heard closing arguments by the House Managers and Mr. Costopoulos.

Simultaneous with closing arguments on September 27, the Committee provided for the first time each senator with "Final Report of the Senate Impeachment Committee" ("Final Report"), and Mr. Larsen was given a copy for the first time. No opportunity was given to respond to the Final Report.

The Senate did not convene the day after closing arguments were given, as had been tentatively scheduled on September 9, 1994.

On October 4, 1994, the full Senate convened to discuss and decide motions and to deliberate and vote on the Articles of Impeachment.

Before the Senate deliberated on the Articles, Senator Williams made several motions, including to establish the standard of proof of clear and convincing evidence, and "to limit consideration by members to testimony and evidence presented only before the body in open session or on a duly transmitted form like the documents that were transmitted here." After discussion, both motions were denied. The motion to limit evidence was denied by a vote of 48-1, with Senator Williams casting the only vote in favor of the motion.

Following denial of these motions, the Senate "deliberated" and then voted on the seven Articles of Impeachment. By a vote of 44 to 5, the Senate convicted Mr. Larsen on Article II, but acquitted him on the other six

Articles, which included criminal charges that had been brought against him. The Senate then voted unanimously to bar Mr. Larsen from holding any office of trust or profit in Pennsylvania.

Frequently, over the course of the 17 days, as witnesses were testifying at the evidentiary hearings, all of the Committee members, at one time or another, left the Senate chamber. No Committee member heard or saw all of the witnesses.

No non-committee senator heard or observed any witness testify in person and did not hear any evidence against Mr. Larsen on Article II.

Article II alleged that in 1988, Mr. Larsen had encouraged improper contact by Pittsburgh lawyer Richard D. Gilardi, who allegedly asked Mr. Larsen personally to review two petitions and then, allegedly at Mr. Larsen's direction, gave him the cover sheets of the cases, writing "yes" on the petition Mr. Gilardi wanted granted and "no" on the petition he wanted denied.

Decision on Article II required Senators to weigh contradictory testimony given by Mr. Larsen, atty. Gilardi, Barbara Roberts, a former secretary of Mr. Larsen and atty. Gilardi, Michael Lydon, a former law clerk of Mr. Larsen, and Professor Nick S. Fisfis, a former allocatur law clerk of Mr. Larsen.

On September 9, 1994, Mr. Larsen testified without qualification that he was innocent of the charge in Article II, including that atty. Gilardi did not come to his chambers with the cover sheets of these petitions.

The Committee ruled that Mr. Larsen could not establish what effect the "WAMS" had on the evidentiary hearings, senators and adverse witnesses.

Articles and editorials reported unfavorably on the proceedings, and implied both before and after that Mr. Larsen was guilty and should be convicted.

In his comments about Article I, Senator Shaffer said "the publicity on this case is absolutely devastating." Senator Shaffer added:

> " . . . let's face it, the general public, because of prior information, because of prior things that went on, have convicted Justice Larsen long ago."

Newspapers in Pennsylvania have generally reported about Mr. Larsen in an unfavorable light. Since about 1980, coverage in newspapers such as *The Pittsburgh Post Gazette* and *The Philadelphia Inquirer* has been mostly negative. In 1982, Mr. Larsen filed an action for defamation and related claims against these papers, which is pending. *Larsen v. Philadelphia Newspapers*, 375 Pa.Super. 66, 543 A.2d 1181 (1988).

In opposing the motion to limit the evidence upon which a verdict was to be based to evidence adduced during the hearings, Senator Shaffer said what was to be the source of the "evidence:"

> "Everybody knows what they know. They know from wherever they found it."

On May 5, 1995, the U.S. District Court for the Eastern District of Pa. granted the writ of habeas corpus sought by

David Lee Yohn. *Yohn v. Love*, 887 F.Supp. 773 (E.D.Pa.).

The district court said that Chief Justice Nix's interference in Yohn's trial was "particularly egregious" and "nothing other than a gross abuse of the jurisdictional limits of his power." The district court noted that the "Supreme Court's handling of [Yohn's] petition [for allocatur] was, at the very least, unprincipled," and that "several holds were placed on the petition, in large part to avoid the embarrassment of airing the internal disputes of the Supreme Court publicly."

On February 9, 1996, the Third Circuit affirmed the district court. *Yohn v. Love*, 76 F.3d 508 (3d Cir. 1996).

Procedural History

On September 13, 1995, Mr. Larsen filed his complaint in this action against the Senate and Senators of the Commonwealth of Pennsylvania, and others, and on February 26, 1996, he filed an amended complaint [A129].

On March 18, 1996, Senators filed motions to dismiss on various grounds.

On July 15, 1996, Mr. Larsen served his motion for partial summary judgment as to Part I(a) of his amended complaint against Senate and Senators. The summary judgment motion added an additional violation of due process, the refusal to limit consideration to the evidence.

On February 28, 1997, the district court decided the numerous motions of defendants to dismiss. *Larsen v. Senate*, 955 F.Supp. 1549 (M.D.Pa. 1997)[A54].

On May 29, 1997, the district court denied Senators' motion for reconsideration and granted Senators' motion to amend the February 28, 1997, order to include the prescribed language under § 1292(b) as to the question:

> "Did Larsen have a constitutionally protected property interest in the elected office of Justice of the Supreme Court of Pennsylvania? [A52]"

On August 18, 1997, the Third Circuit granted Senators' petition for permission to appeal, No. 97-7451 [A41]:

> "The foregoing petition for permission to appeal by Roy C. Afflerbach et al is granted. The issues on appeal will be whether Rolf Larsen has (or had) a constitutionally protected property interest in the elected office of Justice of the Supreme Court of Pennsylvania and if so the extent of that interest. The foregoing cross-petition for permission to appeal is denied."

This court has authority to address any issue fairly included within the certified order of February 28, 1997 (as amended on May 29, 1997 [A52]), including any question reasonably bound up with the certified order, whether it is antecedent to, broader or narrower than, or different from the question specified by the district court; jurisdiction extends to the order, not the question alone. *Yamaha Motor Corp. v. Calhoun*, 116 S.Ct. 619 (1996); Wright & Miller, *16 Fed. Prac. & Proc.* § *3929* (1996).

Accordingly, this court may consider the extent of constitutionally protected liberty and property interests under the Due Process Clause in the elected office of Justice of the Supreme Court of Pennsylvania.

REASONS FOR GRANTING THE WRIT

This court should review the question of legislative immunity because the U.S. Court of Appeals for the Third Circuit has entered a decision that is in conflict with the U.S. Court of Appeals for the Eighth Circuit, *Brown v. Griesenauer*, 970 F.2d 431 (8th Cir. 1992), on the same matter, and because the Third Circuit has decided an important question of federal law that has not been, but should be, settled by this court, and has decided an important federal question in a way that conflicts with *Bogan v. Scott-Harris*, 118 S.Ct 597 (1998), *Forrester v. White*, 484 U.S. 219 (1988), and *Bond v. Floyd*, 385 U.S. 116 (1966).

This court should review the question of the extent of petitioner's liberty and property interests protected under the Fourteenth Amendment because this is a question of federal law that has not been but should be settled by this court.

Legislative immunity

Evidentiary hearings and votes on articles of impeachment are adjudicative, not legislative, in nature.

The Third Circuit held that state senators enjoy absolute legislative immunity when acting in impeachment proceedings and, therefore, cannot be sued under § 1983 even for prospective relief, such as the declaratory and injunctive relief sought here [A35].

The Third Circuit decision is contrary to *Brown v. Griesenauer*, 970 F.2d 431 (8th Cir. 1992). *Brown* held that impeachment proceedings against a mayor by a city board of alderman were adjudicative in nature:

"Although state law entrusts the board of alderman with the authority to impeach the mayor, we do not think that impeachment is a truly legislative act; it is instead an act that happens to have been done by legislators. The act of voting to impeach the mayor is not a 'classic' legislative function such as enacting ordinances or establishing municipal policy. 'Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.' The impeachment proceedings and the vote to impeach did not involve the 'formulation of policy governing future conduct for all or a class of the citizenry.'

* * *

"We think impeachment proceedings are essentially judicial or adjudicative in nature, even though the decision-making body and the form of the proceedings are legislative. * * * In other words, the board of aldermen, sitting as a board of impeachment, functioned like judges in that they were required to determine whether bias existed, to hear testimony and receive evidence, to evaluate the credibility of witnesses and weigh the evidence, and to make findings of fact and conclusions of law [citations omitted]."

Significantly, *Brown* held that the basis in state law of impeachment authority was not determinative of the nature of impeachment. Impeachment proceedings, although delegated by state law (whether by constitution or statute) to a legislative body, are not legislative acts, but are acts that happen to be done by legislators.

The Third Circuit declined to follow *Brown*, creating a conflict between the Circuits, but it also weakly distinguished

Brown, on the ground that municipal legislators may be distinct from state legislators for immunity purposes [A35]. This is contrary to *Bogan*, which equated the two.

In convicting Mr. Larsen and removing and barring him from office, Senators were acting in an adjudicative capacity. *Larsen v. Senate*, 166 Pa.Cmwlth. 472, 646 A.2d 694, 705 (1994), held impeachment in Pennsylvania is adjudicative.

Sen. Stewart J. Greenleaf, chairman of the Senate Impeachment Committee, understood impeachment to be criminal in nature:

> "...I believe our Founding Fathers have established is that they have brought this matter before us, and this matter is brought before us, individually, *to decide whether there has been misbehavior in office, whether there is an infamous crime* that [has] been committed, which is a definition here [emphasis supplied]." *Pa. Legislative Journal -- Senate*, October 4, 1994, p. 35.

"Comparing the procedure to a judicial procedure, an act of impeachment by the House of Representatives is similar to an indictment in a criminal action." Woodside, *Pennsylvania Constitutional Law* (1985).

The Rules of Practice and Procedure of the Senate when sitting on Impeachment Trials, adopted June 23, 1993, confirm that impeachment in Pennsylvania is a quasi-judicial proceeding. Senators take an oath to "do impartial justice according to the Constitution and laws: So help me God." Rule XXV. The rules also confirm that the quasi-judicial proceeding is quasi-criminal. Senators vote guilty or not guilty. Rule XXII.

Officials seeking absolute immunity bear "the burden of showing that such immunity is justified for the function in question." *Forrester*, 484 U.S. at 224.

The Third Circuit looked to label rather than function, contrary to *Forrester*. *Bogan* reaffirmed that legislative immunity must be determined by a functional approach, depending on the nature of the act.

Bogan applied legislative immunity to a mayor when involved in preparing a budget for submission to city council. If a mayor has legislative immunity when participating in the legislative process, it follows that Senators do not have legislative immunity when undertaking an adjudicative process.

Bond demonstrates that state legislators do not have legislative immunity even when carrying out functions integral to the conduct of their constitutionally mandated business. The Supreme Court granted relief to Julian Bond, whom the Georgia legislature refused to seat because of statements about the Vietnam war deemed repugnant. The Third Circuit decision is contrary to *Bond*.

This court should decide this case to resolve confusion in the jurisprudence of legislative immunity between the "label" approach followed by the Third Circuit, exemplified by *Tenney v. Brandhove*, 341 U.S. 367 (1951), and the functional approach of *Forrester* and *Bogan*.

Mr. Larsen alleges that his conviction by the Senators was in retaliation for his speech on matters of public concern, including his outspoken opposition to the unconstitutional interference by the Chief Justice of Pennsylvania in proceedings leading to the murder conviction

of one William Yohn, and the subsequent obstruction by the Chief Justice of appellate proceedings and the failure of the Pennsylvania Supreme Court to grant Yohn a new trial.

Mr. Larsen also alleges violations of the Due Process Clause of the Fourteenth Amendment in the proceedings leading to own impeachment conviction, and he moved for summary judgment on the ground, among others, that the Senators refused to limit themselves to the evidence, but voted to convict based upon: "Everybody knows what they know. They know from wherever they found it."

The Third Circuit decision is inconsistent. In Part III, Justiciability [A20], the decision recognizes the overriding policies of the Fourteenth Amendment and § 1983, in enforcing federally protected rights. The decision there recognizes the distinction between Congress and state legislatures, and that federal court deference to state legislatures is much less.

> "As in *Parker*, we reject the Senators' argument that respect for the sovereignty of the state requires us to decline to exercise our jurisdiction. While the Senators may deem it inappropriate to find themselves as defendants in a federal court, the overriding fact is that the Fourteenth Amendment and § 1983 were intended to radically alter the distribution of power between the federal government and the states [A26]."

Part IV of the decision, Legislative Immunity, overlooks the distinction, citing authorities dealing with the relationship between the *federal courts and Congress* [A27-A34].

The Third Circuit overlooked that the basic protection of legislative immunity attaches to actual "speech or debate" by

legislators. *Gravel v. U.S.*, 408 U.S. 606, 625 (1972). Insofar as legislative immunity is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which legislators participate in proceedings with respect to legislation or other matters. *Hutchinson v. Proxmire*, 443 U.S. 111, 126 (1979).

The Third Circuit overlooked that, insofar as legislative immunity is construed to reach other matters, such matters must be an integral part of the deliberative and communicative processes by which legislators participate in proceedings with respect to legislation or other matters. *Hutchinson*, 443 U.S. at 126.

The Third Circuit overlooked that there is no immunity for practices that simply relate to legislative activities--legislative immunity protects "only purely legislative activities." *U.S. v. Brewster*, 408 U.S. 501, 512 (1972); *Powell v. McCormack*, 395 U.S. 486, 503 (1969); *Chastain v. Sundquist*, 833 F.2d 311, 314 (D.C.Cir. 1987); *Walker v. Jones*, 733 F.2d 923, 930 (D.C.Cir. 1984).

The Third Circuit overlooked that legislative immunity is not meant for the protection of legislators for their own benefit, but to support the rights of the people. *Brewster*, 408 U.S. at 507.[1]

The Third Circuit misplaced reliance on The Federalist No. 65 [A31-A32], which argued in favor of giving the

---

[1]Historically, the privileges of the Speech or Debate Clause emerged from a need to protect the legislature from executive intimidation and harassment. Reinstein and Silverglate, *Legislative Privilege and Separation of Powers*, 86 Harv.L.Rev. 1113, 1120-1144 (1973).

Senate the power to try impeachment under the federal constitution, long before the Civil War amendments and statutes.

The Third Circuit erred in (repeatedly) finding that Mr. Larsen requested reinstatement, when he did not so request [A39]. This error was compounded by connecting it to a remedies question, which has no bearing on whether legislators are entitled to legislative immunity.

The Third Circuit misapprehended and overstated the invasiveness of this lawsuit into activities of Senators. Mr. Larsen endeavored to find out whether and which evidence Senators acquainted themselves with in voting on articles of impeachment.

If impeachment proceedings are legislative rather than judicial in nature, then the conviction of Mr. Larsen was an impermissible bill of attainder, U.S. Const., Art. I, § 9, clause 3. A bill of attainder is a law that legislatively determines guilt and innocence and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. *U.S. v. Lovett*, 328 U.S. 303, 315 (1946).

Constitutionally protected interests

Under the Fourteenth Amendment, a state employee has a property interest in his position when he has a legitimate claim of entitlement to continued employment. *Gilbert v. Homar*, 117 S.Ct. 1807 (1997); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). The district court held that Mr. Larsen had a property interest protected by the Fourteenth Amendment [A88-A90].

Roth also suggested that a state employee has a liberty interest when a state employee is terminated and the state refuses to re-employ him. 408 U.S. at 573-574. A person has a liberty interest in his good name, reputation, honor, and integrity; when they are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). The district court held that Mr. Larsen had not pleaded a liberty interest protected by the Fourteenth Amendment [A105-A106].

Although decided before adoption of the Fourteenth Amendment, *Marbury v. Madison*, 1 Cranch 137 (1803), is directly on point, because the Fifth Amendment contains a due process clause binding on the federal government.

Marbury did not involve the removal of a judge, but the closely analogous decision not to deliver a commission to a judge. *Marbury*, 1 Cranch at 152, held that if Marbury had been appointed to office, then he was "entitled to the possession of those evidences of office, which, being completed, *became his property*."

Marbury held that because Marbury's commission as justice of the peace was not removable by the will of the executive, the appointment was not revocable: "To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right."

Matters of Judges Glancey and Chiovero, 515 Pa. 201, 527 A.2d 997, 1000, 1003, 1005 (1987), shows that Pennsylvania judges have property interests in their positions and that, when they are subject to removal, they are entitled to receive due process consistent with quasi-criminal proceedings.

Pennsylvania Supreme Court Justices had property interests in their elected offices in 1994

In the late colonial era, at least in the royal colonies, judges had been identified with the King of England. Although the U.S. Constitution, ratified in 1789, provided for the independence of the judiciary, such sentiments did not endure among all citizens. Measures by judges perceived as authoritarian were obnoxious to radical republicans, who were in political ascendancy after the election of 1800. This election brought Thomas Jefferson and the anti-federalists to power in the federal government.

Anti-judicial foment gave rise to a number of attacks on judges seeking their removal from office for insubstantial grievances, between 1803 and 1811. Impeachment of judges "was 'in the air.'" Rehnquist, *Grand Inquests* (New York, 1992), p. 128.

The most frequently cited landmark for the independence of the judiciary is the acquittal of U.S. Supreme Court Justice Samuel Chase in 1805. *Grand Inquests*, p. 144 ("acquittal had...profound effect on the American judiciary").

In the same year (1805), three impeached justices of the Pennsylvania Supreme Court won acquittal under similar circumstances. According to the fourth justice, who in effect resigned to protest their impeachments, "the leading cause [for their impeachment] was, however, to be found in the temper of the times, which was disposed to throw off all restraints of law altogether."[2]

---

[2]*Courts and Lawyers of Pennsylvania*, Vol. II, Frank M. Eastman, pp. 343-345 (1922), citing Hugh Henry Brackenridge, in *Law Miscellanies*, "An enquiry into the causes of that

In the early 19th century, Pennsylvania judges were appointed by the governor for life and were removable either by impeachment for "any misdemeanor in office" or by "address"[3] of each branch of the legislature "for any reasonable cause."

Address threatened the independence of the Pennsylvania judiciary because it authorized the removal of judges for lesser cause than impeachment, and the Constitution of 1790 did not require a hearing for removal by address.

Address was abused in the removal of Judge Thomas Cooper of Sunbury, PA, in 1811. The causes for his removal were comparatively trivial, but he did receive a hearing. Himes, *Life and Times of Judge Thomas Cooper* (Carlisle, Pa. 1918).

Pennsylvania accepted the independence of the judiciary and has amended its constitutions in accordance with this principal.[4] Address was abolished, first with respect to

---

obloquy under which the Supreme Court of this State labored from the year 1800 down, during a period of several years."

[3]*Bouvier's Law Dictionary, Baldwin's Century Edition* (Cleveland 1948), defines "Address, In Legislation: ... It is provided as a means for the removal of judges who are deemed unworthy longer to occupy their situations, although the causes of removal are not such as would warrant an impeachment." The first edition of Bouvier's Law Dictionary was published in 1827. John Bouvier was a Pennsylvania lawyer, admitted in Fayette County in 1818.

[4]Pennsylvania history of selection and removal of judges involves five Constitutions, of 1776, 1790, 1838, 1874 and 1968, and numerous amendments thereto, including 1993

Supreme Court justices (1874), and later with respect to all judges of courts of record (1968).

The status of justices and judges of courts of record in Pennsylvania is derived from the Constitution of 1968, as amended in 1993. The 1968 Constitution, as amended, guarantees the independence of the judiciary, by providing for ten-year terms [Art. V, § 15(a)], removal only for cause during term of office, and non-partisan retention elections for successive ten-year terms [Art. V, § 15(c)].

The last impeachment conviction of a judge in Pennsylvania was in 1803, of Common Pleas Judge Alexander Addison. The rarity of the legislature's use of impeachment fostered an understanding that impeachments would be used only for the most serious charges of misbehavior.

Mr. Marbury was subject to impeachment under Art. IV, § 2, of the U.S. Constitution, and was protected by the standards for impeachment of an officer of the United States, Art. IV, § 4, which required that he be guilty at least of a misdemeanor.

Chief Justice Marshall did not consider that Marbury was subject to impeachment to be material to his property interest.

Election of judges is consistent with property interest

Gilbert, *Loudermill*, *Perry*, and *Marbury*, say that a property interest in public employment depends upon

---

amendments.

legitimate claim of entitlement to continued employment, not how the employee got the position.

States use various methods for selecting judges. Judges are appointed and do not run for election in twelve states, including Delaware and New Jersey. Eight states, including Pennsylvania, elect judges through partisan elections, and thirteen do so through non-partisan elections. Initial appointments are made by the governor or legislature in six states and by some form of merit selection in twenty-three states. In seventeen of these twenty-nine "appointment" states, judges stand for reelection or retention election. *ABA Report of the Commission on Separation of Powers and Judicial Independence*, July 4, 1997, at 38.

In Pennsylvania, judges may be elected to ten-year terms [Art. V, § 15(a)], or appointed by the governor to fill a vacancy [Art. V, § 13(b)].

It would be anomalous to hold that judges in appointment states have property interests in their offices, but that judges in election states do not; *a fortiori*, to hold that appointed judges in Pennsylvania have property interests in their employment, but elected judges do not.

That Mr. Larsen's original ten-year term was bestowed directly by the people, and that he was retained by the people for a second ten-year term, enhanced his expectation of continued employment in his office.

Judges are not subject to political process at all times

The district court held that the nature of Mr. Larsen's interest was highly circumscribed because judges are subject to the political process at all times in that they are subject to

impeachment [A90-A92].

The Pa. Constitution, Art. II, § 11, provides that a member of the legislator is subject to expulsion by two-thirds vote of either house. The expulsion provision is ambiguous as to a cause requirement, and provides no procedural protection other than vote by two-thirds. Expulsion is more analogous to the address procedure, abolished in 1874 for Supreme Court justices, and abolished in 1968, for all judges of courts of record.

Unlike legislators, a judge is required to be independent of the political process at all times--subjection to the political process is the antithesis of being a judge.

Pennsylvania judges have limited political rights. *Stretton v. Disciplinary Board*, 944 F.2d 137, 142-144 (3d Cir. 1991) (upholding provision of judicial code that judicial candidates may not announce their views on disputed political or legal issues); *Adams v. Supreme Court of Pa.*, 502 F.Supp. 1282, 1292 (M.D.Pa. 1980)(rule requiring Pa. judges to resign from office to run for Congress does not violate First Amendment); *Linsenmeyer v. Straits*, 402 Pa. 7, 166 A.2d 18, 23-24 (1960)(judges are prohibited from publicly endorsing candidates for public office).

Legislative office is political in nature and this may justify a circumscribed property right in the office holder. The citizens of Pennsylvania have recognized that sitting judges are non-political. For examples:

** A judge seeking retention "files a declaration" and "his name shall be submitted to the electors without party designation . . . to determine only the question whether he shall be retained in office." Pa. Const., Article V, § 15(b).

** Judges must devote full time to their judicial duties and may not hold office in a political party or political organization. Pa. Constitution, Article V, § 17(a).

The Pennsylvania Constitution was amended in 1968 to substitute retention elections for contested elections, in order to reduce the possibility of political subjection of judges.

Similarly, Canon 1, Code of Judicial Conduct, promulgated by the Supreme Court pursuant to its constitutional authority [Article V, § 17(b)], says "An independent and honorable judiciary is indispensable to justice in our society."

Canon 3.A.(1) says a judge "should be unswayed by partisan interests, public clamor, or fear of criticism."

Canon 7 says "A judge should refrain from political activity inappropriate to his judicial office," and prohibits political activity by a judge, "except on behalf of measures to improve the law, the legal system or the administration of justice."

The extent of Mr. Larsen's interests requires due process consistent with quasi-criminal proceedings

The identification of the specific dictates of due process generally requires consideration of three distinct factors: (a) the private interest that will be affected by official action; (b) the risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, (c) the government's interest, including the function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S.

319, 335 (1976).

The nature and formality of the process due is a federal question, and varies depending on the importance of the interests involved and the nature of any subsequent proceeding. *Loudermill*, 105 S.Ct. at 1495; *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 1341-42 (1958).

Interests involved.

The private interests of Mr. Larsen affected by conviction on Article II of the Articles of Impeachment are great. Such interests include: loss of current employment, with its evidences of office, compensation, emoluments, and honor.

Risk of erroneous deprivation.

Many of the violations of due process alleged in the amended complaint and on summary judgment can be broadly characterized as a failure to decide Article II based on evidence pertaining to that article.

Those who vote on final verdicts must be present to find all the facts. *Hastings v. U.S.*, 802 F.Supp. 490, 502-505 (D.D.C. 1992), vacated and remanded, 988 F.2d 1280 (D.C.Cir. 1993), reconsidered on other grounds, 837 F.Supp. 3 (D.D.C. 1993), citing *Goldberg v. Kelly*, 397 U.S. 254, 266, 90 S.Ct. 1011, 1020 (1970).

The facts on Article II were determined by the full Senate. The Committee did not make a recommendation whether the full Senate should find that Mr. Larsen did, in fact, have improper contacts with atty. Gilardi. The full Senate was required to consider the evidence. *Morgan v. U.S.*, 298 U.S. 468, 482 (1936). Where one who determines

the facts which underlie a decision does not consider the evidence, a hearing has not been given. *Id.*

On October 4, 1994, the full Senate denied by a vote of 48-1, the motion of Sen. Williams "to limit consideration by members to testimony and evidence presented only before the body in open session or on a duly transmitted form like the documents that were transmitted here."

Due process does not permit deprivation of property based on unknown past recollections of 49 senators. The one who decides shall be bound to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations. *Morgan*, 298 U.S. at 482.

On October 4, 1994, the full Senate denied the motion of Sen. Williams to establish the standard of proof of clear and convincing evidence.

Due process requires a standard of proof. *Heller v. Doe*, 509 U.S. 312 (1993); *Addington v. Texas*, 441 U.S. 418 (1979).

Given the interests and issues involved, the minimum standard of proof was by clear and convincing evidence. Impeachments, analogous to disbarments, are adversarial proceedings of a quasi-criminal nature. *In re Ruffalo*, 390 U.S. 544, 551 (1968).

After his conviction, Mr. Larsen sought through counsel to learn how non-committee senators became acquainted with the evidence presented against him during the evidentiary hearings. In an April 6, 1995, letter, Sen. Bell said:

"I received so many different notices and written advice on the Larsen impeachment, plus the heavy news media coverage, that I do not recall specific items."

Senator Fisher claimed to have read the transcripts in their entirety. Significantly, he was one of the five senators who voted to acquit on Article II.

It is an ancient doctrine of law that " . . . it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." *Ex parte McCarthy*, 1 K.B. 256, 259 (1923). "[J]ustice must satisfy the appearance of justice. *Offutt v. U.S.*, 348 U.S. 11 (1954). Proceedings must appear to be fair in order to generate ". . . the feeling, so important to a popular government, that justice has been done. . ." *Joint Anti-Fascist League v. McGrath*, 341 U.S. 123, 172 (1951)(Frankfurter, J. concurring).

Conclusion

Petitioner Rolf Larsen asks the court to grant his petition for a writ of certiorari and to review the August 11, 1998, judgment of the Court of Appeals.

Respectfully submitted,

Cletus P. Lyman
Michael S. Fettner
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-7296 & 97-7451

ROLF LARSEN

v.

SENATE OF THE COMMONWEALTH OF PENNSYLVANIA; ROY C. AFFLERBACH; ANTHONY B. ANDREZESKI; GIBSON E. ARMSTRONG; EARL BAKER; ALBERT V. BELAN; CLARENCE D. BELL; LEONARD J. BODACK; MICHAEL E. BORTNER; DAVID J. BRIGHTBILL; J. DOYLE CORMAN; MICHAEL M. DAWIDA; MICHAEL B. FISHER; VINCENT J. FUMO; STEWART J. GREENLEAF; MELISSA A. HART; DAVID W. HECKLER; EDWARD W. HELFRICK; EDWIN G. HOLL; ROXANNE H. JONES; ROBERT C. JUBELIRER; GERALD J. LAVALLE; CHARLES D. LEMMOND, JR.; H. CRAIG LEWIS; J. WILLIAM LINCOLN; F. JOSEPH LOEPER; ROGER A. MADIGAN; BRUCE S. MARKS; ROBERT J. MELLOW; HAROLD F. MOWERY, JR.; RAPHAEL J. MUSTO; MICHAEL A. O'PAKE; FRANK A. PECORA; JOHN E. PETERSON; EUGENE E. PORTERFIELD; TERRY L. PUNT;JEANETTE F. REIBMAN; JAMES J. RHOADES; ROBERT D. ROBBINS; FRANK A. SALVATORE; ALLYSON Y. SCHWARTZ; TIM SHAFFER; JOHN J. SHUMAKER; PATRICK J. STAPLETON; WILLIAM J. STEWART; J. BARRY

STOUT; RICHARD A. TILGHMAN; JACK WAGNER; NOAH W. WENGER; HARDY WILLIAMS; SUPREME COURT OF PENNSYLVANIA; ROBERT NIX; JOHN FLAHERTY; STEPHEN ZAPPALA; NICHOLAS PAPADAKOS; RALPH CAPPY; FRANK MONTEMURO; RONALD CASTILLE; COMMONWEALTH OF PENNSYLVANIA COURT OF JUDICIAL DISCIPLINE; JOSEPH F. MCCLOSKEY; WILLIAM F. BURNS; DAWSON R. MUTH; PETER DEPAUL; CAROL K. MCGINLEY; CHRISTINE L. DONOHUE; JUSTIN M. JOHNSON; WILLIAM CASSENBAUM; JUDICIAL CONDUCT BOARD; JOSEPH A. DEL SOLE; ARTHUR J. EDMUNDS; DIANE M. EDMUNDSON; GERARD P. EGAN; JOHN W. HERRON; FREDERICK WELLS HILL; MATTHEW ANITA MACDONALD; GERALD J. O'CONNOR; ANDREW PALM; CHARLES W. RUBENDALL, II; JAMES E. RUSSO; BERNARD C. WATSON; WILLIAM J. ARBUCKLE, III; BRUCE A. ANTKOWIAK; THOMAS A. BERGSTROM; ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS; NANCY M. SOBOLEVTICH; DAVID A. FRANKFORTER, in their official and individual capacities; INDIVIDUAL SENATORS

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, RENDELL and GIBSON,*Circuit Judges

The petition for rehearing filed by

Appellee Rolf Larsen

in the above-entitled case having been submitted to the judges who participate in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the court en banc,

the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter

Circuit Judge

Dated: SEP 23 1998

---

*Hon. John R. Gibson, United States Court of Appeals for the Eighth Circuit, as to panel rehearing only.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROLF LARSEN,	:	
	:	Nos. 97-7153
Plaintiff-Appellee,	:	97-7296
	:	97-7451
v.	:	
	:	
SENATE OF THE COMMONWEALTH OF PENNSYLVANIA, et al.,	:	
	:	
	:	
Defendants-Appellants.	:	

MOTION OF APPELLEE LARSEN
TO ENLARGE TIME TO FILE PETITION
FOR REHEARING AND FOR REHEARING EN BANC

Plaintiff-appellee Rolf Larsen hereby moves, pursuant to Rule 26(b), Rule 35(c), and Rule 40(a)(1), F.R.A.P., to enlarge the time to file and serve his petition for rehearing and suggestion for rehearing en banc, through September 8, 1998.

The grounds of Mr. Larsen's motion are as follows:

1. On August 11, 1998, this court entered judgment on two decisions in these consolidated appeals, one as to appellants Roy C. Afflerbach, et al., Senators of the Commonwealth of Pennsylvania, Nos. 97-7296 and 97-7451, and one as to justices of the Supreme Court of Pennsylvania, et al., No. 97-7153.

2. Pursuant to Rule 40(a)(1), a party has fourteen days from entry of judgment to petition for rehearing.

3. On August 17, 1998, appellant-justices served a motion to enlarge the time by fourteen days to file and serve their petition for rehearing in No. 97-7153. Mr. Larsen has no objection to this request.

4. Mr. Larsen requests an enlargement because of the importance and complexity of the issues decided by the court, especially the determination that Senators have absolute legislative immunity.

5. Appellants have no objection to Mr. Larsen's

request to enlarge.

6. Requests of the parties to enlarge time should be granted so as to keep the two sets of appeals on parallel tracks.

WHEREFORE, plaintiff-appellee Rolf Larsen asks the court to enlarge the time by fourteen days to file and serve his petition for rehearing and suggestion for rehearing en banc, that is, through September 8, 1998.

Dated: August 20, 1998.

/s/ Michael S. Fettner

Cletus P. Lyman
Michael S. Fettner
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040

Counsel for Plaintiff-Appellee

ORDER

Motion GRANTED

For the Court,

AUG 28 1998

/s/ P. Douglas Sisk
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-7296 & 97-7451

ROLF LARSEN

v.

SENATE OF THE COMMONWEALTH OF PENNSYLVANIA; ROY C. AFFLERBACH; ANTHONY B. ANDREZESKI; GIBSON E. ARMSTRONG; EARL BAKER; ALBERT V. BELAN; CLARENCE D. BELL; LEONARD J. BODACK; MICHAEL E. BORTNER; DAVID J. BRIGHTBILL; J. DOYLE CORMAN; MICHAEL M. DAWIDA; MICHAEL B. FISHER; VINCENT J. FUMO; STEWART J. GREENLEAF; MELISSA A. HART; DAVID W. HECKLER; EDWARD W. HELFRICK; EDWIN G. HOLL; ROXANNE H. JONES; ROBERT C. JUBELIRER; GERALD J. LAVALLE; CHARLES D. LEMMOND, JR.; H. CRAIG LEWIS; J. WILLIAM LINCOLN; F. JOSEPH LOEPER; ROGER A. MADIGAN; BRUCE S. MARKS; ROBERT J. MELLOW; HAROLD F. MOWERY, JR.; RAPHAEL J. MUSTO; MICHAEL A. O'PAKE; FRANK A. PECORA; JOHN E. PETERSON; EUGENE E. PORTERFIELD; TERRY L. PUNT;JEANETTE F. REIBMAN; JAMES J. RHOADES; ROBERT D. ROBBINS; FRANK A. SALVATORE; ALLYSON Y. SCHWARTZ; TIM SHAFFER; JOHN J. SHUMAKER; PATRICK J. STAPLETON; WILLIAM J. STEWART; J. BARRY

STOUT; RICHARD A. TILGHMAN; JACK WAGNER; NOAH W. WENGER; HARDY WILLIAMS; SUPREME COURT OF PENNSYLVANIA; ROBERT NIX; JOHN FLAHERTY; STEPHEN ZAPPALA; NICHOLAS PAPADAKOS; RALPH CAPPY; FRANK MONTEMURO; RONALD CASTILLE; COMMONWEALTH OF PENNSYLVANIA COURT OF JUDICIAL DISCIPLINE; JOSEPH F. MCCLOSKEY; WILLIAM F. BURNS; DAWSON R. MUTH; PETER DEPAUL; CAROL K. MCGINLEY; CHRISTINE L. DONOHUE; JUSTIN M. JOHNSON; WILLIAM CASSENBAUM; JUDICIAL CONDUCT BOARD; JOSEPH A. DEL SOLE; ARTHUR J. EDMUNDS; DIANE M. EDMUNDSON; GERARD P. EGAN; JOHN W. HERRON; FREDERICK WELLS HILL; MATTHEW ANITA MACDONALD; GERALD J. O'CONNOR; ANDREW PALM; CHARLES W. RUBENDALL, II; JAMES E. RUSSO; BERNARD C. WATSON; WILLIAM J. ARBUCKLE, III; BRUCE A. ANTKOWIAK; THOMAS A. BERGSTROM; ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS; NANCY M. SOBOLEVTICH; DAVID A. FRANKFORTER, in their official and individual capacities; INDIVIDUAL SENATORS

Roy C. Afflerbach, Anthony B. Andrezeski, Gibson E. Armstrong, Earl Baker, Albert V. Belan, Clarence D. Bell, Leaonard J. Bodack, Michael E. Bortner, David J. Brightbill, J. Doyle Corman, Michael M. Dawida, Michael B. Fisher, Vincent J. Fumo, Steward J. Greenleaf, Melissa A. Hart, David W. Heckler,

Edward W. Helfrick, Edwin G. Holl, Roxanne H. Jones, Robert C. Jubelirer, Gerald J. Lavalle, Charles D. Lemmond, Jr., H. Craig Lewis, J. William Lincoln, F. Joseph Loeper, Roger A. Madigan, Bruce S. Marks, Robert J. Mellow, Harold F. Mowery, Jr., Raphael J. Musto, Michael A. O'Pake, Frank A. Pecora, John E. Peterson, Eugene E. Porterfield, Terry L. Punt, Jeanette F. Reibman, James J. Rhodes, Robert D. Robbins, Frank A. Salvatore, Allyson Y. Schwartz, Tim Shaffer, John J. Shumaker, Patrick J. Stapleton, William J. Stewart, J. Barry Stout, Richard A. Tighman, Jack Wagner, Noah W. Wenger and Hardy Williams ("the individual senators")

Appellants

On Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. No. 95-cv-01540)

Present: Sloviter, Greenberg and Gibson*[1], Circuit Judges

---

[1]*Hon. John R. Gibson, United States Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel May 19, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the cause is remanded to the said District Court with instruction to dismiss all of Mr. Larsen's claims against the Senators. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk

Clerk

Dated: August 11, 1998

A 12

Rolf LARSEN

v.

SENATE OF THE COMMONWEALTH OF PENNSYLVANIA; Roy C. Afflerbach; Anthony B. Andrezeski; Gibson E. Armstrong; Earl Baker; Albert V. Belan; Clarence D. Bell; Leonard J. Bodack; Michael E. Bortner; David J. Brightbill; J. Doyle Corman; Michael M. Dawida; Michael B. Fisher; Vincent J. Fumo; Stewart J. Greenleaf; Melissa A. Hart; David W. Heckler; Edward W. Helfrick; Edwin G. Holl; Roxanne H. Jones; Robert C. Jubelirer; Gerald J. Lavalle; Charles D. Lemmond, Jr.; H. Craig Lewis; J. William Lincoln; F. Joseph Loeper; Roger A. Madigan; Bruce S. Marks; Robert J. Mellow; Harold F. Mowery, Jr.; Raphael J. Musto; Michael A. O'Pake; Frank A. Pecora; John E. Peterson; Eugene E. Porterfield; Terry L. Punt; Jeanette F. Reibman; James J. Rhoades; Robert D. Robbins; Frank A. Salvatore; Allyson Y. Schwartz; Tim Shaffer; John J. Shumaker; Patrick J. Stapleton; William J. Stewart; J. Barry Stout; Richard Tilghman; Jack Wagner; Noah W. Wenger; Hardy Williams; Supreme Court of Pennsylvania; Robert Nix; John Flaherty; Stephen Zappala; Nicholas Papadakos; Ralph Cappy; Frank Montemuro; Ronald Castille; Commonwealth of Pennsylvania Court of Judicial Discipline; Joseph F. McCloskey; William F. Burns; Dawson R. Muth; Peter DePaul; Carol K. McGinley; Christine L. Donohue; Justin M. Johnson; William Cassenbaum; Judicial Conduct Board; Joseph A. Del Sole; Arthur J. Edmunds; Diane M. Edmundson; Gerald P. Egan; John W. Herron; Frederick Wells Hill; Matthew Anita MacDonald; Gerald J. O'Connor; Andrew Palm; Charles W. Rubendall, II; James E. Russo; Bernard C.

Watson; William J. Arbuckle, III; Bruce A. Antkowiak; Thomas A. Bergstrom; Administrative Office of Pennsylvania Courts; Nancy M. Sobolevtich; David A. Frankforter, in their official and individual capacities;

Individual Senators,

Roy C. Afflerbach, Anthony B. Andrezeski, Gibson E. Armstrong, Earl Baker, Albert V. Belan, Clarence D. Bell, Leonard J. Bodack, Michael E. Bortner, David J. Brightbill, J. Doyle Corman, Michael M. Dawida, Michael B. Fisher, Vincent J. Fumo, Stewart J. Greenleaf, Melissa A. Hart, David W. Heckler, Edward W. Helfrick, Edwin G. Holl, Roxanne H. Jones, Robert C. Jubelirer, Gerald J. Lavalle, Charles D. Lemmond, Jr., H. Craig Lewis, J. William Lincoln, F. Joseph Loeper, Roger A. Madigan, Bruce S. Marks, Robert J. Mellow, Harold F. Mowery, Jr., Raphael J. Musto, Michael A. O'Pake, Frank A. Pecora, John E. Peterson, Eugene E. Porterfield, Terry L. Punt, Jeanette F. Reibman, James J. Rhodes, Robert D. Robbins, Frank A. Salvatore, Allyson Y. Schwartz, Tim Shaffer, John J. Shumaker, Patrick J. Stapleton, William J. Stewart, J. Barry Stout, Richard A. Tighman, Jack Wagner, Noah W. Wenger and Hardy Williams ("the individual Senators"),

Appellants.

Nos. 97-7296, 97-7451

United States Court of Appeals,
Third Circuit.

Argued May 19, 1998.
Decided Aug. 11, 1998.

Before: SLOVITER, GREENBERG, and GIBSON, [FN*] Circuit Judges.

FN* Hon. John R. Gibson, United States Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit,
sitting by designation.

SLOVITER, Circuit Judge.

Rolf Larsen, former Justice of the Supreme Court of Pennsylvania, brought suit under 42 U.S.C. § 1983 against a large number of Pennsylvania entities and individuals. In the portions of the amended complaint at issue in the appeals before us, he asserted various constitutional claims against the Senate of the Commonwealth of Pennsylvania and individual Pennsylvania state Senators for their role in his impeachment and removal from office. Defendants filed a variety of motions in the district court challenging Larsen's right to maintain this action. Currently before us are consolidated appeals filed by individual Senators who challenge the district court's rulings rejecting the claims of nonjusticiability, absolute legislative immunity and qualified immunity arising out of Larsen's failure to demonstrate any property interest in his position as Justice. A related appeal in number 97-7153, which was filed by the individual Justices of the Supreme Court of Pennsylvania and employees of the Administrative Office of the Pennsylvania Courts and which concerns the termination of Larsen's medical benefits, was argued before the same panel of this court, and is the subject of a separate opinion.

I.
Background

Larsen was first elected to the Supreme Court of Pennsylvania in 1977 for a ten-year term beginning January 1978, and was reelected for a second ten years as of 1988. In that year, the Pennsylvania Judicial Inquiry Review Board ("JIRB") charged him with several violations of the Pennsylvania Constitution. In 1991, the JIRB issued a report to the Supreme Court of Pennsylvania in which the Board found that Larsen, while acting without improper motive, had created an appearance of impropriety by engaging in ex parte meetings with a trial judge presiding over cases in the Court of Common Pleas. The report recommended that Larsen be publicly reprimanded. On October 14, 1992, the Supreme Court (by Justices Zappala and Cappy with Justice Papadakos dissenting and voting for remand to the JIRB) issued a per curiam order, without opinion, adopting the JIRB's recommendation. See In re Larsen, 532 Pa. 326, 616 A.2d 529 (1992). On November 24, 1992, Larsen filed a petition for the recusal and disqualification of Justices Zappala and Cappy. The petition alleged that those Justices had not been impartial and had improper motives throughout the investigation of Larsen and in deciding to adopt the JIRB's report and recommendation. Larsen also accused then-Chief Justice Nix of having improperly interfered with a pending trial in Lehigh County and with the petition for allowance to file an appeal in that case. In response to Larsen's petition, Pennsylvania Attorney General Preate appointed two special counsels to investigate Larsen's accusations. After almost a year of grand jury hearings, the grand jury found no credible evidence to support Larsen's allegations. It did, however, identify two areas of alleged misconduct by Larsen. They were that, over the previous ten years, Larsen had maintained a list of petitions for allowance of appeal to be

given special treatment and had regularly obtained prescription drugs for his own use by causing doctors to issue prescriptions in the names of his staff members. On October 22, 1993, the grand jury recommended that criminal charges be filed against Larsen for the latter. Several days later, on October 28, 1993, Larsen was formally charged with violating and conspiring to violate the Controlled Substances Act, 35 Pa. Cons.Stat. § 780-101, et seq. That same day, the Supreme Court relieved Larsen of all responsibilities as a Justice, though he continued to receive his salary. On April 9, 1994, after a five-day trial in the Court of Common Pleas, Larsen was convicted by a jury of two counts of conspiring to violate the Controlled Substances Act. On May 24, the Pennsylvania House of Representatives, which had been investigating Larsen for months, adopted seven Articles of Impeachment against him. They included (I) according special treatment to certain petitions for allowance of appeal in cases where his friends were counsel of record who had made political contributions to him, (II) having ex parte communications with one such counsel and voting consistent with that counsel's position, (III) lying before the grand jury that was investigating him, (IV) communicating with a trial judge regarding a case pending before her and providing extra-record information beneficial to a party represented by one of Larsen's friends, (V) making allegations in bad faith against Justices Zappala and Cappy, (VI) obtaining prescription drugs for his own use in the names of his staff members, and (VII) undermining confidence in the judiciary and betraying the trust of the people of Pennsylvania. Pursuant to the Senate Rules of Practice and Procedure for Impeachment Trials, the President Pro Tempore of the Senate appointed a committee of six Senators to conduct evidentiary hearings regarding the allegations contained in the Articles of Impeachment. On September 20, after a month of hearings before the

committee, the full Senate heard oral argument on Larsen's pretrial motions in which he requested, inter alia, that his trial be held before the full Senate as opposed to a committee, that certain Senators recuse themselves, and that he be allowed to take discovery. All of Larsen's motions were denied without debate. On September 27, the senate committee provided the full Senate and Larsen's counsel with a copy of its final report, containing a summary of the evidence presented at the hearings, and, at the same time, the full Senate heard closing arguments from both sides. On October 4, 1994, the Senate voted 44 to 5 to convict Larsen on Article II and to acquit him on the other six articles. The Senate then voted unanimously to bar Larsen from holding any office of trust or profit in Pennsylvania in the future. On June 13, 1994, the Court of Common Pleas sentenced Larsen on his criminal conviction to probation and community service, later suspended pending appeal. In addition, pursuant to the Pennsylvania Constitution, the trial judge removed Larsen from office as a Justice of the Supreme Court. [FN1]

FN1. On appeal, the Superior Court affirmed Larsen's conviction and remanded only for a recalculation of his term of probation. See Commonwealth v. Larsen, 452 Pa.Super. 508, 682 A.2d 783 (1996), appeal denied, 547 Pa. 752, 692 A.2d 564 (1996).

II.
Procedural History

Larsen instituted the present § 1983 action on September 13, 1995. His 30-page amended complaint names the Pennsylvania Senate, the Supreme Court, the Administrative Office, the Judicial Conduct Board, the Court of Judicial Discipline and the individual members of each

entity in their official and personal capacities. Only Part I of the amended complaint, containing Larsen's claims against the Senate and individual Senators, is relevant to this appeal. There, Larsen alleges in subpart (a) that he was denied rights secured by the Sixth Amendment and the Due Process Clauses of the Fourteenth Amendment of the United States Constitution, listing approximately twenty examples of ways in which the procedures he was accorded allegedly fell below constitutional standards. In subpart (b), Larsen alleges that the statements contained in his petition for the disqualification and recusal of two of his fellow justices were substantial and motivating factors in his removal from office in violation of the First Amendment of the United States Constitution. Larsen seeks compensatory and punitive damages from the Senators in their personal capacities. In the Senators' official capacities, Larsen seeks "declaratory and injunctive relief, voiding the Senate impeachment verdict of guilty on Article II." App. at 97. In the district court, the Senators moved to dismiss Part I of the amended complaint on the grounds, among others, that Larsen's claims are not justiciable, that they are barred by the Eleventh Amendment to the United States Constitution, that the Senators are entitled to absolute legislative immunity, and that the complaint failed to state a claim upon which relief could be granted. The district court ruled that Larsen's claims against the Senate and the Senators were not "political questions" and were justiciable. With respect to the immunity issues, the court dismissed Larsen's claims against the Senate as barred by the Eleventh Amendment, but held that the Eleventh Amendment did not bar Larsen's claims for injunctive and declaratory relief against the individual Senators in their official capacities. In addition, the court dismissed Larsen's claims for damages against the Senators in their personal capacities, holding that the Senators were entitled to absolute legislative immunity from those claims.

Turning to the merits, the court reasoned that Larsen had a "highly circumscribed" property interest in his position and that "for the most part, whatever procedural safeguards to which he was entitled pursuant to the Fourteenth Amendment were met by the impeachment proceedings." Larsen v. Senate of the Commonwealth of Pa. (Larsen I), 955 F.Supp. 1549, 1570 (M.D.Pa.1997). As a result, the court then dismissed the vast majority of Larsen's due process allegations for failure to state claims upon which relief could be granted. On the Senators' motion for reconsideration, the court refused to reconsider its holding that absolute legislative immunity did not preclude the claims seeking prospective injunctive relief in the Senators' official capacities. Larsen v. Senate of the Commonwealth of Pa. (Larsen II), 965 F.Supp. 607, 612 (M.D.Pa.1997). The court did, however, agree to certify for immediate appeal under 28 U.S.C. § 1292(b) its rulings on the issue whether Larsen possessed a constitutionally protected property interest in his position. The district court had jurisdiction over the subject matter of this dispute pursuant to 28 U.S.C. §§ 1331 and 1343. A motions panel of this court granted the Senators' motion to permit the interlocutory appeal with respect to the issue whether Larsen had a constitutionally protected property interest in the elected office of Justice of the Supreme Court of Pennsylvania and, if so, the extent of that interest. We therefore have appellate jurisdiction over that issue pursuant to 28 U.S.C. § 1292(b).

The Senators also appeal from the district court's partial denial of their claim to absolute legislative immunity. We regard the denial of the Senators' claim of absolute legislative immunity as analogous to the denial of a government official's right to claim either absolute or qualified immunity, which the Supreme Court held in Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86

L.Ed.2d 411 (1985), is immediately appealable under the collateral order doctrine first articulated in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Therefore, we have appellate jurisdiction over that claim pursuant to 28 U.S.C. § 1291. Our review of the district court's disposition of a motion to dismiss is plenary. See generally Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir.1997).

III.
Justiciability

The Senators press their contention that Larsen's claim is not justiciable despite the failure of the motions panel to accept that issue for certification under 28 U.S.C. § 1292(b). We agree that it is not only an issue that we can reach, but one that we must reach. The Supreme Court made clear this past term that a federal court cannot proceed to consider the merits of an action until it is satisfied that the dispute falls within the class of cases or controversies to which Article III, § 2 of the United States Constitution has extended the judicial power of the United States. In Steel Co. v. Citizens for a Better Environment, --- U.S. ----, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), the Court disapproved the "doctrine of hypothetical jurisdiction" by which some courts "assumed" jurisdiction for the purpose of deciding the merits. The Court in Steel Co. emphasized that a court that is without proper jurisdiction cannot proceed at all, and must merely note the jurisdictional defect and dismiss the suit. Id. at 1012; see also McNasby v. Crown Cork and Seal Co., 832 F.2d 47, 49 (3d Cir.1987) ("this court has a 'special obligation' to satisfy itself of its own jurisdiction in every appeal presented to it") (quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986)).

It may be that the motions panel did not certify the district court's denial of the motion to dismiss for lack of justiciability because it believed that issue alone did not qualify for interlocutory appeal under § 1292(b). But once it did grant the petition of the Senators and certified the issues whether Larsen had a property interest in the office of Justice and the extent of that interest, we became free to address any matter necessary to our decision of those issues. See Dailey v. Nat'l Hockey League, 987 F.2d 172, 175 (3d Cir.1993). A somewhat similar issue arose in Ivy Club v. Edwards, 943 F.2d 270, 275 (3d Cir.1991), where we held that before reaching the merits of the issue raised by the § 1292(b) certification, we were obliged to determine whether that issue was moot, notwithstanding the fact that the mootness question was not one of the issues certified for appeal. See id. at 275-76. In like manner, we have an obligation to determine whether the instant controversy is justiciable prior to our reaching the merits of the issues certified for appeal.

Once we turn to the issue of justiciability, we find that the basis of the Senators' objection trenches upon, but does not follow, traditional justiciability analysis. The Senators concede that "[t]he issue of justiciability presented here is not so much a 'political question' as it is one of federalism and of a proper respect for state functions." Appellants' Br. at 24. That is an apt characterization. In its seminal opinion in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court noted that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." Id. at 210, 82 S.Ct. 691. It continued, "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.' " Id.

Thus, because the issues raised by Larsen call upon us to review the actions of a state legislature as opposed to the acts of one of the political branches of the federal government, the case does not present a typical "political question" as that term has come to be defined. Nevertheless, the Senators rely on the political question cases and argue that their reasoning applies with equal force here.

The Senators first rely on the Supreme Court's decision in Nixon v. United States, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993), holding nonjusticiable a federal judge's challenge to his impeachment. Walter Nixon, a former United States district judge, filed suit contending that his impeachment trial before a committee of the United States Senate, as opposed to the full Senate, violated the command of Article I of the United States Constitution that "[t]he Senate shall have the sole Power to try all Impeachments," U.S. Const. art. I, § 3, cl. 6. See Nixon, 506 U.S. at 226, 113 S.Ct. 732. The Court reasoned that the word "try" lacked judicially discoverable and manageable standards and that the word "sole" constituted a "textually demonstrable constitutional commitment" to the Senate. Id. at 229-36, 113 S.Ct. 732. It stated that "[a] controversy is nonjusticiable--i.e., involves a political question--where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.' " Id. at 228, 113 S.Ct. 732 (quoting Baker, 369 U.S. at 217, 82 S.Ct. 691). Accordingly, it held that Nixon's claim was nonjusticiable. Id. at 237-38, 82 S.Ct. 691. The Senators argue that, as in Nixon, there is a lack of judicially manageable standards rendering this case nonjusticiable. We do not agree that Nixon controls our analysis, and note that the Supreme Court has cautioned that "[m]uch confusion results from the capacity of the 'political question' label to

obscure the need for case-by-case inquiry." Baker, 369 U.S. at 210-11, 82 S.Ct. 691. Larsen's claims do not implicate Article I, § 3, cl. 6 of the United States Constitution and thus the language of the phrase assigning to the Senate trial of all impeachments is not the issue in this suit. Larsen's challenge to his impeachment is based primarily on the Due Process Clause of the Fourteenth Amendment and the Freedom of Speech Clause of the First Amendment. Both areas of the law are firmly within the domain of the federal judiciary and both are the subject of judicially developed legal principles that guide our decisions. Unlike the political question cases, where the "court[s] acknowledge[ ] the possibility that a constitutional provision may not be judicially enforceable," United States Dept. of Commerce v. Montana, 503 U.S. 442, 458, 112 S.Ct. 1415, 118 L.Ed.2d 87 (1992), issues involving the First and Fourteenth Amendments are regularly enforced by judicial decision. The Senators turn again to Nixon as support for their argument that concerns for finality and the logistical difficulties that would be presented in the event of an order for Larsen's reinstatement counsel against federal court review of his impeachment proceedings. In Nixon, the Court stated that "we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability." Id. at 236, 113 S.Ct. 732 (citing Baker, 369 U.S. at 210, 82 S.Ct. 691). In its discussion, the Court noted the uncertainty of "the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim?" Id. We do not discount the similar difficulties that would be presented in fashioning a remedy for an impeached state judge. However, the Nixon case does not provide a basis for finding nonjusticiability on that ground. In Nixon, the Court explicitly relied on the finality argument only "[i]n

addition to the textual commitment argument." Id. at 236, 113 S.Ct. 732. There is no indication in Nixon or any other case cited by the Senators that, absent a textual commitment to a coordinate branch of the federal government, concerns for finality and the difficulty in formulating appropriate relief alone would suffice to render a case nonjusticiable. The only injunctive relief explicitly sought in the portion of Larsen's amended complaint directed to the Senators is that the court vacate and declare void the conviction of impeachment, relief that could be granted without ordering his reinstatement to the bench. We do note that although Larsen's amended complaint does not include a prayer for reinstatement, the district court understood he was seeking that relief, see 955 F.Supp. at 1557, and Larsen so indicated in this court. Nonetheless, while the difficulty of ordering such relief is relevant in our analysis of a different issue, for the reasons set forth above it is not alone a basis to find the claim nonjusticiable. Finally, the Senators make the broad argument that " 'Our Federalism' counsels strongly against federal courts interfering in state impeachment proceedings which are not reviewable in state courts and which would not be justiciable if they were federal proceedings." Appellants' Br. at 22. They argue that the Pennsylvania Constitution is virtually identical in relevant respect to the United States Constitution and that we must honor its "textually demonstrable commitment" of the responsibility for conducting impeachment trials to the Pennsylvania Senate. However, we are aware of no cases in which the justiciability of a particular claim has turned on a textually demonstrable commitment appearing in any text other than the United States Constitution. A federal court derives its authority to hear a particular case or controversy from the United States Constitution and the various acts of Congress, and no provision removes cases of this kind from federal court jurisdiction. The Senators cite as "instructive" the decision in

Davids v. Akers, 549 F.2d 120 (9th Cir.1977), but the court in that case did not abjure jurisdiction. There, Democratic members of the Arizona House of Representatives brought a § 1983 action alleging that they had been denied equal protection and certain First Amendment rights when the Republican Speaker of the House assigned proportionally more Republicans to the standing committees than their ratio to the number of House Democrats. Although the court characterized the idea of a federal court meddling in the internal affairs of a state legislature as "startlingly unattractive," id. at 123, it rejected the defendants' justiciability argument on the ground that there was no separation of powers concern. Id. at 126. Once it reached the merits, it approved the entry of summary judgment for the defendants on the ground that plaintiffs had failed to state a constitutional claim upon which relief could be granted, id. at 123-25, but that, of course, is a disposition different than one based on lack of justiciability. This court has previously rejected challenges to its ability to hear claims raised against state legislators comparable to the challenges raised here. In Parker v. Merlino, 646 F.2d 848 (3d Cir.1981), a group of New Jersey state senators brought a § 1983 action against certain other senators alleging that their First Amendment rights had been infringed when they were not permitted to participate in debate on particular tax bills. Like the Senators do here, the defendants in Parker argued that maintenance of the suit in federal court constituted an attack on the sovereignty of the State of New Jersey and its legislative branch. We rejected that argument on the ground that our jurisdiction derived from §§ 1983, 1331 and 1343, and we proceeded to reach the merits of the case, which we decided against the plaintiff Senators. See id. at 852 (citing Bond v. Floyd, 385 U.S. 116, 131, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966)) (holding that the Court had jurisdiction to review whether Georgia House of Representatives

deprived one of its members of his constitutional rights when it refused to seat him on account of statements he had made criticizing the conduct of the war in Vietnam); see also Baker, 369 U.S. at 229, 82 S.Ct. 691 (citing Kennard v. Louisiana ex rel. Morgan, 92 U.S. 480, 23 L.Ed. 478 (1875) (where federal courts reviewed merits of claim that state public official's removal from office failed to comport with the Fourteenth Amendment's due process guarantee) and Foster v. State of Kansas ex rel. Johnston, 112 U.S. 201, 5 S.Ct. 8, 28 L.Ed. 629 (1884) (same)); Gomillion v. Lightfoot, 364 U.S. 339, 347, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) ("When a State exercises power wholly within the domain of state interest, it is insulated from judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."). As in Parker, we reject the Senators' argument that respect for the sovereignty of the state requires us to decline to exercise our jurisdiction. While the Senators may deem it inappropriate to find themselves as defendants in a federal court, the overriding fact is that the Fourteenth Amendment and § 1983 were intended to radically alter the distribution of power between the federal government and the states. See, e.g., Quern v. Jordan, 440 U.S. 332, 342, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) ("There is no question that both the supporters and opponents of the Civil Rights Act of 1871 believed that the Act ceded to the Federal Government many important powers that previously had been considered to be within the exclusive province of the individual States."). To the extent that § 1983 may be seen as infringing on state sovereignty, Congress, in adopting § 1983 over a century ago, made the determination that such infringement was not only tolerable but necessary to ensure the vindication of federal rights within the states. Accordingly, although fully cognizant of the respect due members of a state legislature when they act within the

sphere of legitimate state interests, we reject the Senators' arguments that Larsen's claims against them are not justiciable. Many of the concerns they raise can be more appropriately addressed in the context of the immunity doctrines rather than by pretermitting the exercise of our jurisdiction through finding a lack of justiciability.

IV.
Legislative Immunity

We turn directly to the immunity issue. In response to Larsen's complaint, the individual Senators filed motions to dismiss on a number of grounds, one of which was legislative immunity. The district court held that the individual Senators were entitled to absolute legislative immunity from claims asserted against them in their personal capacities--claims seeking only monetary relief. See Larsen I, 955 F.Supp. at 1563. However, the district court did not extend the Senators' legislative immunity to Larsen's claims for prospective injunctive and declaratory relief asserted against the Senators in their official capacities. See Larsen II, 965 F.Supp. at 608.

The Senators devote much of their appeal to their contention that the district court erred in limiting the scope of their immunity to Larsen's claims for damages. Larsen, on the other hand, does not argue explicitly in his brief that the district court was correct in limiting the scope of the Senators' legislative immunity to his claims for monetary relief. Rather, he argues that when the Senators were engaged in the impeachment proceedings, they were performing a judicial, not a legislative, function and, therefore, are entitled only to judicial, as distinguished from legislative, immunity. It is settled that absolute judicial immunity extends only to claims for damages; therefore, if

Larsen is correct that only judicial immunity were applicable, the Senators would not be entitled to dismissal of the claim for injunctive or declaratory relief. See Pulliam v. Allen, 466 U.S. 522, 540- 42, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984).

On its face, § 1983 "admits of no immunities." Imbler v. Pachtman, 424 U.S. 409, 417, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

Nevertheless, courts "have recognized that Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment." Kalina v. Fletcher, 522 U.S. 118, ----, 118 S.Ct. 502, 506, 139 L.Ed.2d 471 (1997). Thus, the Court has stated that a grant of immunity from suit under § 1983 must be "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." Owen v. City of Independence, 445 U.S. 622, 638, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (quoting Imbler, 424 U.S. at 421, 96 S.Ct. 984). "If parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871--s 1 of which is codified at 42 U.S.C. § 1983--we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for action taken under color of state law." Wyatt v. Cole, 504 U.S. 158, 164, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992).

The legislative immunity accorded United States Senators and members of the House of Representatives is derived from the Speech or Debate Clause of Article I, § 6, Clause 1 of the United States Constitution. It has long been settled that state legislators are also entitled to absolute legislative immunity from suit under § 1983 for legitimate

legislative activities taken in their legislative capacities. See Tenney v. Brandhove, 341 U.S. 367, 372-76, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); see also Bogan v. Scott-Harris, --- U.S. ----, ----, 118 S.Ct. 966, 970, 140 L.Ed.2d 79 (1998). Though this immunity is a creature of federal common law, it is derived from the protection accorded the federal legislators. See Tenney, 341 U.S. at 373-74, 71 S.Ct. 783. Indeed, the Supreme Court has recognized that in civil cases, the scope of the common law legislative immunity accorded state legislators is coterminous with that of the immunity provided by the Speech or Debate Clause. See Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719, 732-33, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980).

Recognition of state legislators' entitlement to legislative immunity in § 1983 actions does not end the inquiry because the immunity extends only to acts taken in their legislative capacities. We must still determine whether the Senators performing their role in impeachment proceedings were acting in their legislative or, as Larsen argues, in their judicial capacities. The Supreme Court has adopted a functional approach to immunity issues so that "[w]hether an act is legislative turns on the nature of the act," Bogan, --- U.S. at ----, 118 S.Ct. at 973, rather than the nature of the actor's office or his or her intent. See, e.g., Consumers Union, 446 U.S. at 731, 100 S.Ct. 1967 (affording legislative immunity to justices of state supreme court when acting in their rulemaking capacity). Therefore, to determine whether a particular immunity is appropriate, we must look to the interests behind it, see Owen, 445 U.S. at 638, 100 S.Ct. 1398, remaining mindful that "it is the interest in protecting the proper functioning of the office, rather than the interest in protecting its occupant, that is of primary importance." Kalina, 522 U.S. at

----, 118 S.Ct. at 507. The Supreme Court had occasion to examine the extent of legislative immunity when an organization that was the subject of an investigation by a Senate Subcommittee sought to enjoin enforcement of the Subcommittee's subpoena directed to third parties. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975). The Supreme Court framed the question to be resolved as "[w]hether the actions of the [Senators] fall within the 'sphere of legitimate legislative activity.'" Id. at 501, 95 S.Ct. 1813. The Court began its analysis with a discussion of the purpose of legislative immunity, which it explained is "to protect the integrity of the legislative process by insuring the independence of individual legislators." Id. at 502, 95 S.Ct. 1813 (quotation omitted). It "prevent[s] intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." Id. (quotation omitted). As such, it reinforces the separation of powers that is fundamental to the structure of both the federal and state governments. See id.; Tenney, 341 U.S. at 372-75, 71 S.Ct. 783. It stated that legislative independence is imperiled whenever the power of the judiciary is brought to bear on the legislature. See Eastland, 421 U.S. at 503, 95 S.Ct. 1813. An additional purpose of legislative immunity is to shield the legislature from the delay and disruption that a lawsuit can bring. "[A] private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." Id.

Consistent with these purposes, the Court has held that "[a]bsolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" Bogan, --- U.S. at ----, 118 S.Ct. at 972 (quoting Tenney, 341 U.S. at 376, 71 S.Ct. 783). To determine whether a

particular task is in the sphere of legitimate legislative activity, "we look to see whether the activities took place in a session of the House by one of its members in relation to the business before it." Eastland, 421 U.S. at 503, 95 S.Ct. 1813. More specifically, the inquiry is whether the activities are "an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Id. at 504, 95 S.Ct. 1813 (quoting Gravel v. United States, 408 U.S. 606, 625, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972) (emphasis added)). Most recently, the Supreme Court reaffirmed that legislative immunity attaches to actions taken " 'in a field where legislators traditionally have power to act.' " Bogan, --- U.S. at ----, 118 S.Ct. at 973 (quoting Tenney, 341 U.S. at 379, 71 S.Ct. 783 (applying principle to state legislators)). Applying that criterion to legislative action in impeachment and conviction of a federal judge, the Supreme Court noted that the Constitution places impeachment within the sole jurisdiction of Congress. See Nixon v. United States, 506 U.S. 224, 229, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993). Impeachments take place in session and are the official business before the legislature. It thus unhesitatingly concluded that this is an area where legislatures traditionally have the power to act. In Nixon, the Court, after reviewing the history of the impeachment clause, stated: "Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers." Id. at 235, 113 S.Ct. 732. In The Federalist No. 65, Alexander Hamilton advocated to the people of the State of New York the wisdom in placing the power to try impeachments in the Senate. The Federalist

No. 65 (Alexander Hamilton). Though he referred to "the judicial character of the Senate" when sitting for that purpose, he emphasized that impeachments "are of a nature which may with peculiar propriety be denominated POLITICAL." Id. at 439 (Jacob E. Cooke ed., 1961) (emphasis in original). He conceived of the power of impeachment as "a bridle in the hands of the legislative body" id. at 441, 96 S.Ct. 984, and offered two compelling reasons why the courts, particularly the Supreme Court, were an inappropriate repository for the awesome power of impeachment. First, he argued: The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the Judges, ... who are to pronounce the sentence of the law and the party who is to receive or suffer it. The awful discretion, which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons. Id. at 441-42, 96 S.Ct. 984. Hamilton then strengthened his argument with the following reasoning: The punishment, which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country; he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons, who had disposed of his fame and his most valuable rights as a citizen in one trial, ... for the same offence, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error in the first sentence would be the parent of error in the second sentence? That the strong bias

of one decision would be apt to overrule the influence of any new lights, which might be brought to vary the complexion of another decision? Those, who know any thing of human nature, will not hesitate to answer these questions in the affirmative; and will be at no loss to perceive, that by making the same persons Judges in both cases, those who might happen to be the objects of prosecution would in a great measure be deprived of the double security, intended them by a double trial. Id. at 442, 96 S.Ct. 984. These arguments confirm that the placement in the Senate of the power to try impeachments was not by accident or chance. See id. at 440, 96 S.Ct. 984 (describing the Senate as "the most fit depositary of this important trust"). Rather, the power was consciously assigned to the Senate primarily as a function of the separation of powers. As such, allowing the courts to review the Senate's judgment following trial on impeachment would negate the careful balancing designed by the framers and approved by the ratifiers. Of course, when the impeachment has been of a judge, the need is most imperative for legislative independence from judicial review and for protection from "accountability before a possibly hostile judiciary." Eastland, 421 U.S. at 502, 95 S.Ct. 1813.

Although a legislature that sits in impeachment proceedings is not debating, drafting or voting on legislation, "the sphere of legitimate legislative activity," Bogan, --- U.S. at ----, 118 S.Ct. at 972, for purposes of legislative immunity, is not so limited. See, e.g., Tenney, 341 U.S. at 379, 71 S.Ct. 783 (state legislators accorded legislative immunity in suit alleging that legislators sought to intimidate and or silence a witness by holding hearing and by encouraging prosecution of witness); Powell v. McCormack, 395 U.S. 486, 506, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) (members of Congress accorded legislative immunity in suit

challenging refusal by House to seat an elected member); Kilbourn v. Thompson, 103 U.S. 168, 203-04, 26 L.Ed. 377 (1880) (legislative immunity protected legislators from suit challenging issuance of contempt order and arrest warrant for failure to testify).

Given that impeachments are matters "'which the Constitution places within the jurisdiction of either House,'" Eastland, 421 U.S. at 504, 95 S.Ct. 1813 (quoting Gravel v. United States, 408 U.S. 606, 625, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972)), and represent "'a field where legislators traditionally have power to act,'" Bogan, --- U.S. at ----, 118 S.Ct. at 973 (quoting Tenney, 341 U.S. at 379, 71 S.Ct. 783), we are convinced that when legislators play the role they have been given in impeachment proceedings, they act within the sphere of legitimate legislative activity and within their legislative capacities. Thus, the necessity for independence requires that legislators be accorded legislative immunity and "not be questioned in any other place," U.S. Const. art. I, § 7, cl. 1, concerning their activity and their decision.

Larsen, to support his argument that impeachment is not legislative in nature, relies on the standards we developed for determining whether certain acts performed at the local level are legislative or administrative. See, e.g., Carver v. Foerster, 102 F.3d 96, 100 (3d Cir.1996) (citing cases). In making that decision, we ask whether the act is "substantively legislative" as involving policy-making or line drawing and whether it is "procedurally legislative" as being "passed by means of established legislative procedures." Id. The line-drawing between administrative and legislative acts at issue in these cases has no bearing under the situation before us because neither party suggests that the Senators were acting in an administrative capacity. Moreover,

because concerns for the separation of powers are often at a minimum at the municipal level, we decline to extend our analysis developed for municipalities to other levels of government. For the same reason, we are not persuaded that Brown v. Griesenauer, 970 F.2d 431 (8th Cir.1992), compels a different result. There, the court held that the members of a local board of aldermen that impeached the mayor were entitled only to judicial rather than legislative immunity because it characterized impeachment as essentially a judicial act "that happens to have been done by legislators." Id. at 437. As the preceding discussion makes clear, impeachment is not something that just happened to be assigned to the legislative branch, at least at the state and federal levels.

We conclude, therefore, that the Senators were acting in their legislative capacities while engaged in Larsen's impeachment proceedings, and, accordingly, that they were entitled to legislative immunity from claims for damages in their individual capacities. This was the conclusion also reached by the district court in its thoughtful principal opinion. See Larsen I, 955 F.Supp. at 1563. In the discussion of the Eleventh Amendment, the court noted that Larsen had also requested declaratory and injunctive relief against the Senators in their official capacities, specifically the voiding of the Senate impeachment verdict of guilty. The court held that Larsen's claims against the Senate and other state entities, such as the Supreme Court, were barred by the Eleventh Amendment, but that Larsen's request to void the impeachment was one for prospective reinstatement that was not precluded. See id. at 1562.

The district court did not explicitly consider the applicability of legislative immunity to Larsen's request for prospective relief, see id., and it is unclear whether the

Senators had invoked that doctrine as to the claims asserted against them in their official capacities. The Senators sought reconsideration on that issue, asking the court to reconsider its holding that absolute legislative immunity does not preclude Larsen's claims against them in their official capacities for prospective injunctive relief. Without any discussion, the court declined to reconsider its prior holding because it believed that its decision was in accordance with prior Third Circuit discussions of this issue, citing Acierno v. Cloutier, 40 F.3d 597 (3d Cir.1994) (en banc). See Larsen II, 965 F.Supp. at 608-09. We are aware that language in that opinion may have led to some confusion on this issue. In Acierno, where we considered the availability of legislative immunity to various activities of members of the county council, there is dicta with respect to the scope of legislative immunity that is misleading and, regrettably, incorrect. We stated, inter alia, that "the Supreme Court has never held that legislative immunity applies to both claims for damages and injunctive relief" citing Consumers Union, 446 U.S. at 731-34, 100 S.Ct. 1967, and stated further that this court and others have held "that absolute immunity is a bar to damages only, and not to prospective or injunctive relief," Schrob v. Catterson (Schrob II), 967 F.2d 929 (3d Cir.1992). See Acierno, 40 F.3d at 607 n. 8. Reexamination of the cited cases discloses that in fact the Supreme Court in Consumers Union did resolve the issue of the application of absolute legislative immunity to claims for prospective relief and answered that question in the affirmative. The Consumers Union case presented the Supreme Court with a challenge to attorneys' fees imposed on the Virginia Supreme Court and its Chief Justice by a district court following its holding that the state Bar Code's prohibition of lawyer advertising was unconstitutional. As we noted supra, the Supreme Court held that in promulgating disciplinary rules the Virginia Supreme Court "acted in a legislative capacity."

Id. at 731, 100 S.Ct. 1967. In the discussion of the consequence in terms of legislative immunity, the Court referenced its earlier decision in Tenney. Its discussion left no doubt of the scope of legislative immunity. It said, "Although Tenney involved an action for damages under § 1983, its holding is equally applicable to § 1983 actions seeking declaratory or injunctive relief. In holding that § 1983 'does not create civil liability' for acts ... 'in a field where legislators traditionally have power to act,' we did not distinguish between actions for damages and those for prospective relief." Id. at 732-33, 100 S.Ct. 1967 (citation omitted). The Court therefore held both declaratory relief and attorneys' fees were unavailable. The issue the Court left unresolved in Consumers Union did not concern legislative immunity but whether judicial immunity would bar prospective relief. See Consumers Union, 446 U.S. at 735, 100 S.Ct. 1967 ("we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts"). Similarly, the issue in Schrob II did not relate to absolute legislative immunity, but instead was the applicability of absolute prosecutorial immunity from common law tort claims under the Federal Tort Claims Act. See Schrob II, 967 F.2d at 939. The various immunities, legislative, judicial, prosecutorial and official, have different purposes and characteristics. Unfortunately, the dicta in Acierno did not accurately distinguish between them, as the cases relied upon for the proposition asserted concerned immunities other than legislative. [FN2] We are not obliged to perpetuate that error out of blind adherence to a position articulated in a case where the issue was not squarely before us. " 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.' " Spencer v. Kemna, --- U.S. ----, ---, 118 S.Ct. 978, 990, 140 L.Ed.2d 43 (1998)(Ginsburg, J., concurring) (quoting Henslee v. Union Planters Nat. Bank &

Trust Co., 335 U.S. 595, 600, 69 S.Ct. 290, 93 L.Ed. 259 (1949) (Frankfurter, J., dissenting)).

FN2. In two of the three cases that involved legislative immunity, the courts agreed that "[l]egislators' immunity is absolute and extends to injunctive as well as damage suits." Risser v. Thompson, 930 F.2d 549, 551 (7th Cir.1991) (citing Tenney, 341

U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)). Accord Alia v. Michigan Supreme Court, 906 F.2d 1100, 1102 (6th Cir.1990). In the third case, Executive 100 Inc. v. Martin County, 922 F.2d 1536, 1539-40 (11th Cir.1991), the discussion was dictum as no prospective relief was sought against the local legislators.

It is likely that our error led the district court astray on that issue in this case. In fact, as noted above, the Supreme Court has unambiguously held that the legislative immunity enjoyed by state, as well as federal, officials is "applicable to § 1983 actions seeking declaratory and injunctive relief." Consumers Union, 446 U.S. at 732, 100 S.Ct. 1967; see also Spallone v. United States, 493 U.S. 265, 278, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990); Eastland, 421 U.S. at 501-03, 95 S.Ct. 1813 (applying legislative immunity to United States Senators in action seeking only declaratory and injunctive relief). These cases show that, at least in appropriate cases, legislators are entitled to immunity from claims for injunctive and/or declaratory relief. [FN3]

FN3. Larsen is mistaken in his citation of Parker v. Merlino, 646 F.2d 848 (3d Cir.1981), as illustrating that legislative immunity is inapplicable to suits for prospective injunctive relief. Parker, discussed supra, involved a

complaint by some New Jersey state Senators against others that they had not been given the opportunity to debate the merits of tax bills. We explicitly noted that the appellants did not raise on appeal the district court's holding that the state legislators were immune only against liability for money damages. See id. at 852 n. 11.

Legislative immunity must be applied pragmatically, and not by labels. Thus, without attempting to draw a line for all cases, we examine whether Larsen's request for prospective relief from the Senators could be accorded consistent with the policies underlying legislative immunity. The extent to which a court could order relief must be considered in that context. This is not a case where the court, should Larsen be successful, need merely direct the seating of a properly elected legislator, see Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966), nor a case where the legislative body had previously agreed to a consent decree to build racially desegregated housing, see Spallone, 493 U.S. at 270-73, 110 S.Ct. 625. Larsen seeks reinstatement--nothing less than that the individual Senators rescind their guilty vote on his impeachment. It is difficult to imagine a remedy that would more directly interfere with the role assigned exclusively to the Senators by the Pennsylvania Constitution. Larsen's challenges to the impeachment proceedings include the Senate's use of a committee to hear evidence, the absence of some committee members during presentation of evidence, the inadequacy of the final report, the format of the report, the inadequacy of the evidence, the factors considered by the Senators in casting their votes, and the alleged consideration by Senators of material outside the record. Larsen candidly states that he "is entitled to discovery on the activities and participation of each senator in the proceedings and decisions." Appellees' Br. at 48. The extensive discovery Larsen seeks into the

motives for the Senators' votes, discussion among them, material each considered and the myriad other matters that enter into any legislator's vote would entail the paradigmatic impermissible questioning of the Senators in another place about their disposition of a matter we have already held lies within the sphere of their legislative activities. See Tenney, 341 U.S. at 377, 71 S.Ct. 783 ("The privilege would be of little value if [legislators] could be subjected to ... the hazard of a judgment against them based upon a jury's speculation as to motives."). This would also cause the other injury that underlies the need for legislative immunity by diverting their time and attention away from legislative duties. Merely to state the effect is to recognize why legislative immunity must cover the prospective injunctive relief Larsen seeks against the Senators. [FN4]

FN4. As the prospective relief sought is of necessity against the Senators in their official capacities, we do not discourse on the differences between immunity in their individual as distinguished from official capacities.

V.
Conclusion

Accordingly, we conclude that the Senators were entitled to the protections of legislative immunity from suit for Larsen's claims for prospective injunctive relief. Because the immunity issue disposes of the entirety of Larsen's allegations against the Senators, we need not address the issue of whether Larsen possessed a constitutionally protected property interest in his elected position. We will remand the matter to the district court with instructions to dismiss all of Larsen's claims against the Senators.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.97-8080 and 97-8089

In Re: Larsen v. Senate of
the Commonwealth

(Middle District of PA (Harrisburg)
D.C. Civil No. 95-cv-1540 (SHR))

Present: GREENBERG, NYGAARD and ROTH,
Circuit Judges

1. Petition for Permission to Appeal under 28 U.S.C. section 1292(b) and Fed.R.App.P 5 by Roy C. Afflerbach, et al. in 97-8080.

2. Cross-Petition to Appeal under 28 U.S.C. section 1292(b) and Fed.R.App. 5 by Rolf Larsen in 97-8089 AND Response by Rolf Larsen in opposition to Petition for Permission to Appeal by Roy C. Afflerbach in 97-8080.

3. Response by Roy C. Afflerbach, et al. To Petition for Permission to Appeal by Rolf Larsen in 97-8089.

/s/ Colleen Mckeown

Colleen McKeown
Case Manager
Direct Dial 597-4495

ORDER

The foregoing petition for permission to appeal by Roy C. Afflerbach et al is granted. The issues on appeal will be whether Rolf Larsen has (or had) a constitutionally protected property interest in the elected office of Justice of the Supreme Court of Pennsylvania and if so the extent of that interest. The foregoing cross-petition for permission to appeal is denied.

By the Court,

/s/ Morton I. Greenberg
Circuit Judge

Dated: AUG 18, 1997

Rolf LARSEN, Plaintiff,

v.

SENATE OF THE COMMONWEALTH OF PENNSYLVANIA, et al., Defendants.

Civil Action No. 1:CV-95-1540.

United States District Court,
M.D. Pennsylvania.

May 29, 1997.

RAMBO, Chief Judge.

MEMORANDUM

The court's memorandum and order dated February 28, 1997 spawned the following motions which are presently before the court: (1) the motion of the individual Senate Defendants for reconsideration, or, in the alternative, motion for certification pursuant to 28 U.S.C. § 1292(b), (2) the motion of Defendants Administrative Office of the Pennsylvania Courts (the "AO"), Nancy Sobolevitch, and 28, 1997 order and to dismiss all claims against the AO based on Eleventh Amendment immunity, (3) the joint motion of Defendants individual justices of the Pennsylvania Supreme Court, the AO, Nancy Sobolevitch, and David Frankforter to stay proceedings in this court, (4) the motion of Defendants individual members of the Court of Judicial Discipline ("CJD") to clarify and/or amend the court's February 28, 1997 memorandum, (5) Larsen's conditional motion to amend the court's February 28, 1997 order to

include the statement prescribed by 28 U.S.C. § 1292(b) if the court determines certification pursuant to the Senate Defendants' motion is appropriate, and (6) Larsen's motion for reconsideration. The issues have been briefed and the motions are ripe for disposition.

I. Discussion

The history of this case and Larsen's claims against the various Defendants were previously and exhaustively set forth in the court's February 28, 1997 memorandum and will not be repeated herein except where relevant to the court's disposition of the instant motions.

A. The Individual Senate Defendants' Motion for Reconsideration or, in the Alternative, for Certification Pursuant to 28 U.S.C. § 1292(b) that absolute legislative immunity precludes only Larsen's claims for money damages against them personally--not his claims against them in their official capacities for prospective injunctive relief. The court declines to reconsider its prior holding as its decision is in accordance with prior Third Circuit discussion of this issue. See Acierno v. Cloutier, 40 F.3d 597, 608 n. 8 (3d Cir.1994) (noting that Third Circuit has held that absolute immunity bars claims for damages only, not claims for prospective or injunctive relief) (citing Schrob v. Catterson, 967 F.2d 929, 939 (3d Cir.1992)).

In the alternative, the Senate Defendants ask the court to certify for immediate appeal the court's February 28 order because the order addresses the following controlling questions of law: (1) whether Larsen's challenge to his impeachment trial before the Pennsylvania Senate presents a justiciable question which can be answered by a federal court, and, if the answer to the preceding question is in the

affirmative, (a) does the complaint state a cause of action for the deprivation of due process rights, specifically, did Larsen possess a constitutionally protected property interest in his position as a supreme court justice, and (b) has Larsen stated a claim for the deprivation of his First Amendment rights where he was impeached for conduct which is unrelated to the alleged protected speech, and where he does not dispute that he engaged in the conduct for which he was impeached.

Section 1292(b) permits the court in its discretion to certify an interlocutory order where the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and ... an immediate appeal from the order may materially advance the termination of the litigation." 28 U.S.C. § 1292(b). The Senate Defendants' treatment in their brief of the three factors the court must consider in deciding whether to certify pursuant to s 1292(b) is relatively scant. Specifically, although Defendants contend that "there are substantial grounds for difference of opinion regarding [the] Court's holdings on the issues of justiciability, due process and First Amendment claims," (Senate Defs.' Br. in Supp. of Recons. at 6), Defendants also note that "research discloses that this case presents the first time any federal court has been asked to review an impeachment trial conducted by a state legislature," (id. at 7). Unfortunately, the fact that this case may involve an issue of first impression does not warrant certification pursuant to s 1292(b). Furthermore, none of the cases cited by Defendants suggest that there are substantial grounds for a difference of opinion regarding the applicability of the political question doctrine to federal court challenges to state legislative functions. Accordingly, although the court recognizes that a definitive word from the Third Circuit on the justiciability of Larsen's challenge to the Senate impeachment proceedings would be invaluable in the instant

case, Defendants have not demonstrated the existence of the three factors prescribed by s 1292(b). Accordingly, the court will decline to certify based on the question of justiciability.

Defendants cite no case law which supports their contention that substantial grounds for a difference of opinion exist regarding the court's holding on the issue of whether the complaint states a claim for deprivation of Larsen's First Amendment rights. Thus, certification based on this question is inappropriate. The court finds, however, that the issue of whether Larsen possessed a property interest in his position is an issue which justifies certification pursuant to s 1292(b). Reversal by the Third Circuit of the court's determination that Larsen possessed a "highly circumscribed" interest in his position as a supreme court judge would terminate the majority of Larsen's remaining claims against the individual Senate Defendants, and possibly other Defendants, and, therefore, greatly simplify the litigation. Thus, this issue constitutes a controlling question of law for purposes of certification under s 1292(b).

There are also substantial grounds for a difference of opinion regarding whether Larsen possessed a property interest in his prior position. At least one other district court has reached a different conclusion regarding whether judges in Pennsylvania possess property interests in their positions. See Guarino v. Larsen, 821 F.Supp. 1040 (E.D.Pa.), rev'd on other grounds, 11 F.3d 1151 (3d Cir.1993). The Guarino court's failure to address the Pennsylvania Supreme Court's decisions in In re 1991 Pennsylvania Legislative Reapportionment Commission, 530 Pa. 335, 609 A.2d 132 (1992), cert. denied, 504 U.S. 921, 112 S.Ct. 1971, 118 L.Ed.2d 571 (1992), and Sweeney v. Tucker, 473 Pa. 493, 375 A.2d 698, 698 (1977), led this court in its February 28 memorandum to decline to follow the Guarino court's

reasoning. Nevertheless, the Guarino court's opinion demonstrates that there are substantial grounds for a difference of opinion regarding the issue of whether judges in Pennsylvania hold property interests in their jobs. Accordingly, certification of the court's February 28 order is appropriate on this basis.

Finally, certification of the court's February 28 order is appropriate because an immediate appeal of the issue of whether Larsen possessed a property interest in his job could materially advance the termination of the litigation. Depending on the outcome, appellate review in this case could avoid expensive and protracted discovery on Larsen's due process claims and ultimately eliminate a trial on these issues. Accordingly, the court will certify its February 28, 1997 order pursuant to s 1292(b).

B. The Motion of the AO, Nancy Sobolevitch, and David Frankforter for Partial Reconsideration of the Court's February 28, 1997 Order In its February 28, 1997 memorandum, the court declined to grant the AO's motion to dismiss based on Eleventh Amendment immunity because its arguments in support of its position were "conclusory" and provided little basis upon which to determine that dismissal pursuant to the Eleventh Amendment was proper. The AO has now filed a motion for reconsideration of that portion of the court's order, elaborating on its earlier stated position.

In essence, the AO argues that the Eleventh Amendment prohibits all of Larsen's claims against it because it is an arm of the state. In its brief in support of its motion for reconsideration, the AO contends that an evaluation of the factors set forth by the Third Circuit in Peters v. Delaware River Port Auth., 16 F.3d 1346, 1350

(3d Cir.1994), cert. denied, 513 U.S. 811, 115 S.Ct. 62, 130 L.Ed.2d 20 (1994), mandates dismissal of Larsen's claims against it. The court agrees. First, any judgment against the AO would be paid from the state treasury. The AO is funded entirely by the Commonwealth. Its budget is part of the judicial branch's budget which is approved by the Pennsylvania legislature. See 42 Pa. Cons.Stat. Ann. §§ 1727-1728; see also Act of 1995-5A, 1995 Laws of Pennsylvania 749, 849, 853 and 855 (budget appropriations for and allocations by court administrator). Second, pursuant to state law, the AO possesses attributes characteristics of an arm of the state. The administrative authority of the Commonwealth's unified judicial system is created by Article V, s 10(b) of the Pennsylvania Constitution. Pa. Const. Art. V, s 10(b) ("The Supreme Court shall appoint a court administrator and may appoint such subordinate administrators and staff as may be necessary and proper for the prompt and proper disposition of the business of all courts and justices of the peace."). The AO is the Pennsylvania Supreme Court's administrative arm. The AO's sole function is to carry out those administrative and supervisory responsibilities over Pennsylvania's unified judicial system which are expressly delegated to it by the Pennsylvania Supreme Court. See 42 Pa. Cons.Stat. Ann. §§ 1901-1903, 1721-1722, 1701-1703; Pa.R.J.A. 501-508. The court has already determined that the Pennsylvania Supreme Court is an arm of the state for Eleventh Amendment immunity purposes. Accordingly, its administrative arm also is. The Pennsylvania legislature has evidenced its intent that the AO be deemed an arm of the state by specifically including it in the definition of "Commonwealth government" in the general provisions of the Commonwealth's judicial code. See 42 Pa. Cons.Stat. Ann. s 102. Third and finally, the AO does not operate autonomously from the Commonwealth. The AO is funded

entirely by the Commonwealth, its functions are specifically delegated to it by the supreme court, and the supreme court appoints and possesses removal authority over the AO's highest official, the court administrator of Pennsylvania. 42 Pa. Cons.Stat. Ann. s 1901; Pa. Const. Art. V, s 10(b). The Pennsylvania Constitution also provides the supreme court with express authority to appoint such subordinate administrators and staff of the AO as necessary for the prompt and proper disposition of the business of the courts. Pa. Cons.Art. V, s 10(b); 42 Pa. Cons.Stat. Ann. s 1903. Because all of the Peters factors are met in this case, the court concludes that the AO is an arm of the Commonwealth for Eleventh Amendment immunity purposes and will grant the AO's motion for reconsideration. Furthermore, as the AO points out, consistent with the court's previous analysis as set forth in its February 28 memorandum at pages 22-25, the Eleventh Amendment also bars Larsen's claims for money damages against Defendants Sobolevitch and Frankforter in their official capacities. Larsen's claims for injunctive and declaratory relief against Defendants Sobolevitch and Frankforter are not barred. C. Joint Motion of Individual Supreme Court Members, the AO, and Defendants Sobolevitch and Frankforter for Stay of Proceedings in this Court The individual Supreme Court Defendants, the AO, and Defendants Sobolevitch and Frankforter have moved to stay further proceedings in this court. The Supreme Court and AO Defendants have also indicated to the court that they intend to file an appeal of the court's February 28 order denying their motion to dismiss Larsen's claims against them based on qualified immunity. Indeed, Defendants filed a joint notice of appeal on March 27, which was premature due to the filing of their motion for reconsideration. However, upon issuance of this memorandum and accompanying order disposing of the AO's motion for reconsideration, the court presumes that the

supreme court and AO Defendants will pursue their appeal. Such an appeal would temporarily divest this court of jurisdiction over Larsen's claims against them. A stay by this court of Larsen's claims against the individual supreme court Defendants, the AO and Defendants Sobolevitch and Frankforter would be superfluous. Accordingly, the court will deny Defendants' joint motion for a stay. D. Motion by Individual Members of the CJD for Clarification and/or Amendment of the Court's February 28, 1997 Memorandum In subparagraph six of the court's February 28 order, the court dismissed all claims asserted against the individual members of the CJD in the personal and official capacities. The court's memorandum, however, did not explicitly set forth the basis for its dismissal of Larsen's claims against the individual members of the CJD in their personal capacities. This omission was an oversight by the court. The court's conclusion that abstention under Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), was appropriate requires dismissal of all claims asserted against the individual members of the CJD, including Larsen's claims against them in their personal capacities. Accordingly, the court will grant the CJD members' motion and amend page thirty-six of the court's February 28 memorandum to reflect that the granting of abstention under Younger effectuates a dismissal of all claims against the individual CJD members in both their official and personal capacities. In light of its decision to abstain, the court declines to address the CJD Defendants' argument that the doctrine of judicial immunity operates to bar Larsen's claims against them. E. Larsen's Conditional Motion to Amend the Court's February 28 Order to Include Statement Pursuant to 28 U.S.C. § 1292(b) and Motion for Reconsideration Larsen moves the court to reconsider several portions of its February 28 decision. None of the grounds argued by Larsen justify reconsideration of the court's prior rulings and his motion

will be denied in its entirety. Additionally, the court will deny Larsen's motion to certify the court's February 28 order pursuant to s 1292(b). The issues identified by Larsen are not ones for which there are substantial grounds for differences of opinion. Accordingly, certification pursuant to s 1292(b) is inappropriate. The court will deny the motion.

II. Conclusion

The court will grant the Senate Defendants' motion to certify the court's order of February 28, 1997 for the reasons stated in this memorandum. The court will grant the AO, and Defendants Sobolevitch and Frankforter's motion for reconsideration. The motion of the Supreme Court Defendants, the AO, and Defendants Sobolevitch and Frankforter for a stay will be denied. The court will grant the individual CJD member's motion to clarify and/or amend and Larsen's motions will be denied in their entirety. An appropriate order will be issued.

ORDER

In accordance with the accompanying memorandum of law, IT IS HEREBY ORDERED THAT:

(1) The motion of the individual Senate Defendants for reconsideration, or, in the alternative, motion for certification pursuant to 28 U.S.C. § 1292(b) is DENIED IN PART AND
GRANTED IN PART:

(a) The court declines to reconsider its memorandum and order dated February 28, 1997;

(b) The court's order of February 28, 1997 is amended to include the following paragraph: "Pursuant to 28 U.S.C. § 1292(b), the court certifies that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the termination of the litigation."

(2) The motion of the Administrative Office of the Courts, Nancy Sobolevitch, and David Frankforter for partial reconsideration of the court's February 28, 1997 order and to dismiss all claims against the Administrative Office based on Eleventh Amendment immunity is GRANTED:

(a) All claims asserted against the Administrative Office of the Courts are DISMISSED;

(b) Larsen's claims for damages against Defendants Sobolevitch and Frankforter in their personal capacities are DISMISSED.

(3) The joint motion of the individual justices of the Pennsylvania Supreme Court, the Administrative Office of

the Pennsylvania Courts, Nancy Sobolevitch, and David Frankforter to stay proceedings in this court is DENIED.

(4) The motion of the individual members of the Court of Judicial Discipline to clarify and/or amend the court's February 28, 1997 memorandum is GRANTED in that page thirty-six of the court's February 28, 1997 memorandum is amended to reflect that the granting of abstention under Younger v. Harris results in the dismissal of the individual Court of Judicial Discipline members in their official and personal capacities.

(5) Larsen's conditional motion to amend the court's February 28, 1997 order to include the statement prescribed by 28 U.S.C. § 1292(b) if the court determines certification pursuant to the Senate Defendants' motion is appropriate is DENIED.

(6) Larsen's motion for reconsideration is DENIED.

A54

Rolf LARSEN, Plaintiff,

v.

SENATE OF THE COMMONWEALTH OF PENNSYLVANIA, et al., Defendants.

Civil Action No. 1:CV-95-1540.

United States District Court, M.D. Pennsylvania.

Feb. 28, 1997.

MEMORANDUM

SYLVIA H. RAMBO, Chief Judge.

I. Introduction

Before the court is a plethora of motions. There are four separate motions to dismiss filed on behalf of: (1) Defendants Senate of Pennsylvania and the individual Senators, (2) Defendants Judicial Conduct Board ("JCB") and individual Judicial Conduct Board members, (3) Defendants Court of Judicial Discipline ("CJD") and its individual members, (4) Defendants Supreme Court of Pennsylvania and the individual justices thereof, and (5) Defendants Administrative Office of the Pennsylvania Courts, Nancy Sobolevitch, and David Frankforter. In addition, also pending before the court are the Senate Defendants' motion for costs pursuant to Federal Rule of Civil Procedure 41(d) and to strike portions of the amended complaint and the JCB Defendants' motion for sanctions under Rule 11. Furthermore, on July 15, 1996, Plaintiff Larsen filed a motion

for partial summary judgment. In light of Defendants' pending motions, on July 29, 1996, the court stayed briefing on Plaintiff's motion. This memorandum and accompanying order will dispose of all motions presently pending before the court except for Larsen's motion for partial summary judgment.

II. Procedural and Factual History

Plaintiff Larsen is a former Justice of the Pennsylvania Supreme Court. Larsen was initially elected to the Supreme Court for a ten-year term commencing in January 1978. He was reelected for a second term beginning in 1988. This case arises out of Larsen's removal from office in October 1993 based on allegations that he engaged in criminal activity. Larsen was removed from office by order of the Pennsylvania Supreme Court on October 28, 1993, convicted on April 9, 1994 on two counts of criminal conspiracy under the Controlled Substances Act, impeached by the Senate on October 4, 1994, and removed from his position by the CJD on June 3, 1994. In this action, Larsen sues virtually every entity and individual which played a role in his removal from office. He claims, generally, various due process, First Amendment, and equal protection violations in the removal procedures afforded him. Larsen alleges the following facts in support of his claims. In or around 1988, the Judicial Inquiry and Review Board ("JIRB") charged Larsen with several violations of Article 5, Section 17(b) of the Pennsylvania Constitution. [FN1]

Section 17(b) provides that "[j]ustices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court." Pa. Const. art. 5, § 17(b). The JIRB investigated Larsen and on July 17, 1991 issued a report to

the Supreme Court of Pennsylvania in which it found that Larsen, acting without improper motive, had created an appearance of impropriety by meeting ex parte with a trial judge presiding over a case pending in the Allegheny County Court of Common Pleas. The JIRB recommended that Larsen be publicly reprimanded. In re Larsen, 532 Pa. 326, 616 A.2d 529 (1992). On October 14, 1992, the Supreme Court by Justices Zappala and Cappy, with Justice Papadakos dissenting, issued an order per curiam without opinion adopting the JIRB's report and recommendation. Id.

FN1. The JIRB is the predecessor of the JCB.

On November 24, 1992, Larsen served a petition for the disqualification and recusal of Justices Zappala and Cappy. Larsen served a "supplemental" petition on December 14, 1992, and a second "supplemental" petition on January 7, 1993. In his petitions, Larsen raised issues of partiality and improper motivation on the part of Justices Zappala and Cappy during the JIRB's investigation of him and in deciding to adopt the JIRB's report and recommendation. Larsen requested that Justices Zappala and Cappy recuse themselves or, in the alternative, that they be disqualified from considering the JIRB's report and recommendation. Larsen also accused Chief Justice Nix of acting improperly by interfering in a pending trial in Lehigh County, and interfering in the defendant's petition for allowance of appeal in that case.

In response to Larsen's allegations, former attorney general Earnest Preate, Jr. appointed two special counsels to investigate Larsen's claims. Over the course of 1993, a grand jury heard testimony regarding Larsen's allegations as well as the JIRB's accusations against Larsen. The grand jury ultimately found two areas of alleged misconduct by Larsen:

(1) that he systematically maintained a list of petitions for allowance of appeal to be given special handling by his staff, and (2) that he regularly obtained prescription medications for his own use by causing a physician to issue prescriptions in the names of members of his staff.

On October 22, 1993, the grand jury recommended that criminal charges be brought against Larsen for his procurement of prescription drugs in the name of his staff members. On October 28, 1993, Larsen was charged with criminal conspiracy and multiple violations of the Controlled Substances Act. That same day, the Pennsylvania Supreme Court relieved Larsen "of any and all judicial and administrative responsibilities as a justice." (Defs.' Ex. B.) Larsen continued to receive his salary. In January 1993, while the grand jury was deliberating, Representative Christopher K. McNally filed a petition in the Pennsylvania House of Representatives calling for Larsen's impeachment based on alleged violations of the Code of Judicial Conduct. On November 5, 1993, the grand jury's report was made public. The grand jury report formed the basis for the Pennsylvania House of Representative's and the JCB's investigation of Larsen. The House Judiciary Committee requested and obtained copies of the transcripts of witnesses' testimony and exhibits presented to the grand jury. On November 23, 1993, the House adopted House Resolution No. 205 authorizing the House Judiciary Committee to investigate Larsen's conduct. The House Judiciary Subcommittee on Courts held public hearings in conjunction with its investigation into the allegations against Larsen.

On April 9, 1994, after a five day trial in the Allegheny Court of Common Pleas, a jury convicted Larsen of two counts of criminal conspiracy under the Controlled Substances Act. Thereafter, on April 22, 1994, the House

Subcommittee voted to recommend to the entire House a resolution to impeach Larsen. On May 18, 1994, House Resolution 324 was introduced listing seven articles of impeachment against Larsen and on May 24, 1994 the House adopted Resolution 324. [FN2]

FN2. The articles of impeachment accused Larsen, generally, of "misbehavior in office." Specifically, the articles of impeachment charged Larsen with: (1) tracking petitions for allowance of appeal to the Supreme Court of Pennsylvania so that these petitions could be specially handled by members of his staff--these petitions received special treatment because counsel of record were friends of and made political contributions to Larsen; (2) communicating ex parte with an attorney who was a friend and political supporter of Larsen in cases in which he had petitions for allowance of appeal pending before the Supreme Court and voting consistent with the positions being advocated by that attorney; (3) lying before the grand jury that was investigating him; (4) communicating with an Allegheny County Court of Common Pleas judge regarding a civil case before that judge and providing extra-record information to that judge potentially beneficial to a litigant in that matter represented by a friend of Larsen's; (5) making bad faith allegations with a reckless disregard for the truth against Justices Zappala and Cappy in his petition and supplemental petitions for their disqualification and recusal; (6) obtaining prescription drugs in the name of his staff for his own use; and (7) undermining confidence in the integrity and impartiality of the judiciary and betraying the trust of the people of Pennsylvania. (Defs.' Ex. G.)

On June 6, 1994, the Senate received the articles of impeachment from the House Managers and pursuant to Article 10 of the Senate Rules of Practice and Procedure for

impeachment trials, appointed a committee of six senators ("the Senate committee") to conduct evidentiary hearings regarding the allegations against Larsen. [FN3] Senator Robert Jubelirer, President Pro Tempore of the Senate, appointed Senators Stewart Greenleaf, Charles Lemmond, H. Craig Lewis, Jeannette Reibman, Tim Shaffer, and Hardy Williams to the committee. On June 20, 1994, Larsen filed an answer with new matter to the articles of impeachment. On June 30, 1994, Larsen filed an omnibus pretrial motion with the Senate, requesting that the Senate dismiss the action of the Senate committee and that his impeachment trial be held before the full Senate. Larsen also moved for a pretrial hearing before the full Senate, discovery, the recusal of certain Senators, a continuance, and the payment of attorney's fees and costs.

FN3. Pursuant to the Pennsylvania Constitution, the House of Representatives possesses exclusive authority to impeach. Pa. Const. art. 6, § 4. The constitution further provides that "[a]ll impeachments shall be tried by the Senate." Pa. Const. art. 6, § 5.

On August 8, 1994, the Senate committee commenced evidentiary hearings on the articles of impeachment. The committee concluded hearings on September 9, 1994. On September 20, 1994, the full Senate heard oral argument on Larsen's pretrial motions and subsequently voted without debate to deny all of his motions.

On September 27, 1994, the full Senate convened and heard closing arguments by the House Managers and Larsen's counsel. Simultaneously, the Senate committee for the first time provided the individual Senators and Larsen's counsel with a copy of its final report. The report contained a summary of evidence presented at the hearings.

On October 4, 1994, the Senate voted on the seven articles of impeachment. The Senate voted forty-four to five to convict Larsen on article II. Article II charged Larsen with engaging in an ex parte communication with an attorney who was a friend and political supporter of his regarding two petitions for allowance of appeal the attorney had pending before the Pennsylvania Supreme Court. At Larsen's request, the attorney indicated the position he was advocating in each case. Larsen ultimately voted in accordance with the attorney's stated positions. The Senate voted to acquit Larsen on the other six articles. The Senate then voted unanimously to bar Larsen from holding any office of trust or profit in Pennsylvania in the future.

At the same time the House and Senate were proceeding against Larsen, the JCB was also investigating the allegations against him. The JCB is a twelve member board formed pursuant to Article 5, Section 18 of the Pennsylvania Constitution to investigate allegations of judicial misconduct. Pa. Const. Art. 5, § 18. In appropriate circumstances, the JCB may file a formal complaint with the CJD. The CJD is an eight member state administrative tribunal formed pursuant to Article 5, Section 18(b) of the Pennsylvania Constitution to hear and determine charges of judicial misconduct. In January 1994, the JCB wrote Larsen and notified him that it was instituting an investigation into all of his activities as a Supreme Court Justice. On March 10, 1994, JCB filed an application with the CJD for an interim order directing the suspension of Larsen with pay, on the basis that Larsen had been charged with a felony in the Allegheny Court of Common Pleas. The JCB requested that if and when Larsen was convicted, that his suspension be automatically converted to a suspension without pay.

On or about March 20, 1994, Larsen filed an answer

with new matter to the JCB's application. On March 25, 1994, the CJD denied the JCB's application.

On April 9, 1994, an Allegheny Court of Common Pleas jury convicted Larsen on two felony counts. On April 18, 1994, the JCB filed a second application to suspend Larsen without pay. In support of its application, the JCB averred Larsen's conviction on criminal charges in the Allegheny Court of Common Pleas. Larsen had yet to be sentenced and had appealed his convictions. On May 5, 1994, Larsen filed an answer and new matter to the JCB's application. On May 16, 1994, the JCB filed a response to new matter. The CJD conducted a hearing on the JCB's second application on May 25, 1994. Exhibits regarding Larsen's criminal information and jury verdicts were admitted into evidence. Larsen's counsel moved to bifurcate the hearing to permit him to introduce testimony at a later date. The CJD denied the motion. On June 3, 1994, the CJD granted the JCB's application for an interim order suspending Larsen without pay. Thereafter, on June 6, 1994, the JCB filed a formal complaint against Larsen with the CJD. [FN4]

FN4. The amended complaint is unclear in delineating the charges against Larsen raised in the JCB's formal complaint. Paragraph ninety of the amended complaint asserts that "[o]n June 6, 1994, the JCB filed with the CJD, "Board Complaint--Formal Charges" against Justice Larsen, alleging, among other things, matters alleged in his petitions for the disqualification and recusal of Justice Zappala and Justice Cappy." (Am.Compl. ¶ 90). Since Larsen's petitions for the disqualification of Justices Zappala and Cappy contained allegations against them and not against Larsen, the court presumes Larsen to allege that the JCB complaint charged him with making false statements in his petitions for disqualification and recusal.

Larsen instituted the present action on September 13, 1995. In response, all Defendants filed motions to dismiss, arguing various reasons why the complaint should be dismissed. On February 26, 1996, Plaintiff filed an amended complaint, thereby mooting Defendants' pending motions. Defendants again moved to dismiss the amended complaint in its entirety, alleging various procedural and substantive irregularities.

Larsen's claims against the various Defendants are too numerous to recite herein and will be discussed as necessary in the context of addressing the merits of Defendants' individual motions. Generally, Larsen alleges that in each of the proceedings which resulted in his removal from judicial office, Defendants violated his rights to due process and equal protection, and retaliated against him in violation of the First Amendment based on his statements in his petitions for the disqualification and recusal of Justices Zappala and Cappy, and his statements regarding Chief Justice Nix. Larsen seeks reinstatement, compensatory damages, monetary damages, and resumption of his medical insurance benefits.

III. Discussion

A. Law Governing Motions to Dismiss

In addressing Defendants' motions, the court is required to accept as true all of the factual allegations in the amended complaint and all reasonable inferences that can be drawn from its face. Nami v. Fauver, 82 F.3d 63, 65 (3d Cir.1996); see also Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); White v. Napoleon, 897 F.2d 103, 106 (3d Cir.1990). "The complaint will be deemed to have alleged sufficient facts if it adequately put[s] the defendants on notice of the essential elements of ...

plaintiff['s] cause of action." Nami, 82 F.3d at 65. The court will not dismiss the amended complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim[s] which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

At the outset of its discussion, the court notes that several Defendants argue that Larsen's claims against them are moot in that he seeks reinstatement to the bench, a remedy which the court cannot provide as Larsen was removed from office as part of his sentence imposed by the Allegheny Court of Common Pleas following his trial. While this is true, the court notes that Larsen has appealed his criminal conviction and sentence, challenging his removal from office. On August 5, 1996, while the current motions were pending before this court, the superior court declined to entertain Larsen's challenge on appeal to his removal from office, holding that the issue was moot due to the Senate's impeachment of him. Commonwealth v. Larsen, 452 Pa.Super. 508, 682 A.2d 783, 793-94 (1996). Because the possibility remains that the Supreme Court of Pennsylvania will hold differently and address the merits of Larsen's challenge to his sentence, the court does not find it appropriate to dismiss Larsen's claims at this time based on mootness. [FN5]

FN5. Although no party has so informed the court, the court presumes that Larsen will undertake further appeals of his criminal conviction and sentence.

The court will address Defendants' arguments in support of dismissal seriatim.

B. Rooker-Feldman

The Senate and individual Senate Defendants argue that the court lacks jurisdiction over Larsen's claims based on the Rooker-Feldman doctrine. Under the Rooker-Feldman doctrine, district courts "lack subject matter jurisdiction to engage in appellate review of state-court determinations or to evaluate constitutional claims that are 'inextricably intertwined with the state court's [decision] in a judicial proceeding.'" Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth. of New York and New Jersey Police Dep't, 973 F.2d 169, 177 (3d Cir.1992) (quoting District Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483, 103 S.Ct. 1303, 1316, 75 L.Ed.2d 206 n. 16 (1983)); see also Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). In addition, Rooker-Feldman deprives district courts of jurisdiction to hear appeals from interlocutory orders issued by lower state courts, Port Auth., 973 F.2d at 177-78, and from entertaining constitutional claims that a litigant could have raised in a prior state court proceeding but chose not to, Valenti v. Mitchell, 962 F.2d 288, 296 (3d Cir.1992).

A federal claim is inextricably intertwined with a claim raised in a prior state court proceeding if granting the requested relief would require the district court to overrule a prior state court judgment. FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996). Where a federal court could not grant the federal plaintiff's requested relief without reversing or modifying a previous decision of a state court, the court does not have subject matter jurisdiction to entertain the federal plaintiff's claim. Marks v. Stinson, 19 F.3d 873, 885 n. 11 (3d Cir.1994); Kirby v. City of Philadelphia, 905 F.Supp. 222, 225 (E.D.Pa. 1995).

Prior to the commencement of the Senate impeachment proceedings, on July 26, 1994, Larsen filed suit in the Pennsylvania Commonwealth Court seeking a preliminary injunction enjoining the proceedings. Larsen v. Senate of Pennsylvania, 166 Pa.Cmwlth. 472, 646 A.2d 694, 695 (1994). The Senate Defendants argue that under the Rooker-Feldman doctrine, Larsen's prior court proceeding and the commonwealth court's decision in that case deprive this court of jurisdiction over Larsen's claims in the instant case. In his commonwealth court action, Larsen raised several claims similar to the ones he seeks to litigate in the present action, namely that: (1) the Senate improperly delegated to the Senate committee the responsibility for conducting the impeachment trial, (2) the Senate and Senate committee violated his due process rights by failing to grant his motion for an extension of time or rule on other of his pretrial motions, and (3) the Senate and the committee violated his rights to a fair trial and effective assistance of counsel by denying his request for payment of attorney's fees. [FN6] Larsen, 646 A.2d at 697-98. The commonwealth court declined to address the propriety of the Senate's actions, concluding that the impeachment provisions of the Pennsylvania Constitution commit the impeachment power to the Senate "to an extent which clearly bars the courts from intervening with prior restraint." Id. at 705.

FN6. In the commonwealth court action, Larsen also argued that: (1) his impeachment trial violated the federal constitutional prohibition against double jeopardy, (2) he was not properly subject to impeachment proceedings as the supreme court had already removed him from his position as supreme court justice, and (3) the impeachment charges against him did not amount to a constitutionally valid basis for impeachment. Larsen, 646 A.2d at 697-98.

The court stated:

> "Impeachment involves an adjudicative process, but one which has been clearly set apart by the Constitution as distinguished from adjudications by the judicial branch of government, regardless of whatever powers the courts may have to interpret actions of the legislative body, by way of review, after they have been taken. As in the case of scrutinizing the constitutionality of statutes themselves, the courts clearly have no power to intervene by injunction in advance of legislative action, any more than a court would have any power to enjoin in advance, the enactment of a law appearing (to the courts) to be constitutionally invalid. Id. (emphasis added)."

The court interprets the commonwealth court's decision as merely holding that it lacked the authority to issue a prior restraint upon the Senate and the Senate committee. Thus, granting the relief requested by Larsen in the instant action would not require the court to overrule the commonwealth court's prior decision. Indeed, many of the claims that Larsen raises in the present case arose out of the impeachment process itself which had not begun at the time the commonwealth court ruled on his motion for a preliminary injunction. It would have been impossible for Larsen to assert claims at that time based on events that had not yet occurred. Several of Larsen's constitutional claims arose out of the impeachment proceedings, could not have been raised prior to the impeachment trial, and, thus, cannot be considered inextricably intertwined with claims he did raise in the commonwealth court. Additionally, the commonwealth court recognized the possibility that upon conclusion of the impeachment proceedings, it might possess

the power to hear Larsen's claims. Id. at 700, 705. The commonwealth court appeared reluctant, however, based on the political question doctrine to make an explicit holding regarding a state court's jurisdiction to hear claims at the completion of the impeachment proceedings. Id. at 702- 04. Therefore, even if the commonwealth court had held that the political question doctrine prohibited it from hearing Larsen's claims at the conclusion of the impeachment proceedings, granting the relief requested in the present case would not require the court to overrule the commonwealth court's decision that it was barred from entertaining Larsen's claims. Accordingly, the court will not dismiss Larsen's claims against the Senate and individual Senate Defendants based on the Rooker-Feldman doctrine.

C. Political Question Doctrine

The Senate and individual Senate Defendants argue that Larsen's constitutional challenge to the manner in which they conducted his impeachment trial involves a political question and that the court should decline to exercise its jurisdiction over Larsen's claims on this basis.

The political question doctrine applies "where there is 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it....' " Nixon v. United States, 506 U.S. 224, 228, 113 S.Ct. 732, 735, 122 L.Ed.2d 1 (1993) (emphasis added) (quoting Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962)). The policy behind the political question doctrine derives from the need to maintain separation of powers between coequal branches of government. Elrod v. Burns, 427 U.S. 347, 351, 96 S.Ct. 2673, 2679, 49 L.Ed.2d 547 (1976) (citing Baker, 369 U.S. at 217, 82 S.Ct.

at 710). "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the political question." Baker, 369 U.S. at 210, 82 S.Ct. at 706 (internal quotations omitted). Thus, the political question doctrine does not prohibit the court from hearing Larsen's constitutional claims arising out of the Senate's actions. See Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966); Gewertz v. Jackman, 467 F.Supp. 1047, 1055 (D.N.J.1979). [FN7] The court will deny the Senate Defendants' motion to dismiss based on the application of the political question doctrine.

FN7. The Senate and individual members concede that "[a]lthough in its purest form, the so-called 'political question doctrine' applies only in cases involving the relationship between the federal judiciary and a co-equal branch of the federal government ... this Court's inquiry cannot stop there." (Senate Br. in Supp. at 23.) Neither of the cases cited by Defendants support the extension of the political question doctrine to cases where a federal court is asked to review the constitutionality of actions by a state legislature. Although Defendants quote a rather lengthy passage from the Supreme Court's decision in Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), in which the Court talks about leaving the states free to perform inherent state functions, Defendants omit from their citation an internal quotation to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The Court's citation to Younger reveals that the passage addresses the appropriateness of abstention and offers nothing regarding the applicability of the political question doctrine. Likewise, Defendants cite Davids v. Akers, 549 F.2d 120 (9th Cir.1977), suggesting that it provides support for their contention that the political question doctrine precludes the

court from addressing Larsen's claims. However, the Ninth Circuit in Davids explicitly held that the political question doctrine does not apply to the federal judiciary's relationship to the states and addressed the merits of the plaintiffs' claims. Id. at 123- 27.

D. The Eleventh Amendment

Several Defendants assert that they are immune from suit pursuant to the Eleventh Amendment. Larsen has sued all Defendants in their official and personal capacities. (Compl. ¶ 13.) Specifically, Larsen asks the court to grant judgment in his favor:

(1) against the Senate and Senators in their official capacities, granting declaratory and injunctive relief, voiding the Senate impeachment verdict of guilty of Article II; (2) against the Senators in their personal capacities, awarding damages including loss of past and future wages and benefits, emotional harm, injury to reputation, and counsel fees; (3) against the Supreme Court, ... Judicial Conduct Board, and all individual members, in their official capacities, granting declaratory and injunctive relief: (i) voiding the Court of Judicial Discipline's order dated June 3, 1994, of suspension without pay; (ii) voiding the appointments to the Judicial Conduct Board and the Court of Judicial Discipline; and (iii) voiding the action of interfering with plaintiff's right to practice law; (4) against the Supreme Court, Court of Judicial Discipline ... and all members in their personal capacities, awarding damages, including loss of past and future wages and benefits, emotional harm, injury to reputation, and counsel fees; (5) against the Supreme Court and individual justices and Administrative Office and individual members in their official capacities, granting declaratory and injunctive relief, voiding the action of terminating plaintiff's health and

medical benefits; (6) against the Supreme Court and individual justices and Administrative Office and individual members in their personal capacities, awarding damages for medical expenses incurred by plaintiff from June 4, 1994, to date; and, (7) against all individual defendants in their personal capacities for punitive damages and other such relief as the court may find appropriate. (Compl. at ¶¶ 29-30.)

"[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984). This jurisdictional bar applies regardless of whether the plaintiff is seeking equitable relief or monetary damages. Papasan v. Allain, 478 U.S. 265, 276, 106 S.Ct. 2932, 2939, 92 L.Ed.2d 209 (1986); Pennhurst, 465 U.S. at 100-01, 104 S.Ct. at 908. Additionally, suits against state officials will be deemed suits against the state and barred by the Eleventh Amendment if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." Pennhurst, 465 U.S. at 101 n. 11, 104 S.Ct. at 908 n. 11 (quoting Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963) (internal quotations omitted)). The one well-known exception to this rule is where a suit challenges the constitutionality of a state official's conduct. Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The Supreme Court has narrowly applied Young 's exception. Pennhurst, 465 U.S. at 102, 104 S.Ct. at 909. In Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Court held that federal courts may award prospective injunctive relief to plaintiffs challenging the constitutionality of a state official's conduct. "Both

prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in Ex parte Young, gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interests in assuring the supremacy of that law." Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985).

The Senate, the Supreme Court, and the CJD argue that Larsen's claims against them are in effect claims against the Commonwealth of Pennsylvania and are, therefore, barred by the Eleventh Amendment. The court agrees and will dismiss all claims asserted against the Senate, Supreme Court, and the CJD.

Larsen appears to contest only mildly the contention that his suit against the Senate is a suit against the Commonwealth of Pennsylvania for Eleventh Amendment purposes. Other than citing Liveright v. Joint Comm. of Tenn. Gen. Assembly, 279 F.Supp. 205, 211 (M.D.Tenn. 1968) in support of his claim that "[a] legislative body is not immune from suit for injunctive relief," Pl.'s Br. in Oppos. at 20, he does not dispute that his suit against the Senate is a suit against the Commonwealth. [FN8] Although the court in Liveright did not address the question of whether a legislative body was immune from suit pursuant to the Eleventh Amendment, Larsen asks the court to presume it stands for such a proposition based on the district court's award of injunctive relief against the committee. The court declines to adopt such a theory.

FN8. The court notes that Liveright was decided before the majority of the Supreme Court's decisions outlining the scope of the Eleventh Amendment.

Moreover, Larsen misunderstands the relevant inquiry in determining whether a suit against a state agency is barred by the Eleventh Amendment. The question of whether a state agency is entitled to Eleventh Amendment immunity depends upon whether it is an arm of the state, not upon the type of relief sought. In making the determination of whether an entity is an arm of the state, the Third Circuit has outlined three factors for the court to consider. See Peters v. Del. River Port Auth., 16 F.3d 1346, 1350 (3d Cir.1994), cert. denied 513 U.S. 811, 115 S.Ct. 62, 130 L.Ed.2d 20 (1995). First, the court must assess whether if the plaintiff succeeds on his claims the judgment would be paid from the state treasury. Second, the court must examine the status of the entity pursuant to state law. Third, the court should consider the extent of autonomy enjoyed by the entity. The first factor is the most important one. Id.; see also Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655, 659 (3d Cir.1989) (en banc).

The court finds that the Senate is entitled to Eleventh Amendment immunity. It is difficult to imagine what entity would be considered an arm of the Commonwealth if the Senate were not. Application of the Peters factors seems cumbersome in the present context. The Senate is one of the governing branches of the Commonwealth. Thus, under Peters, the question the court is required to answer is, in essence, whether the Senate is independent from itself. Any judgment obtained by Larsen would be satisfied by the state treasury and the court concludes that the Senate is an arm of the Commonwealth for Eleventh Amendment immunity purposes.

The court reaches the same conclusion with regard to the Supreme Court, and at least one other court has already so held. Mattas v. Supreme Court of Pennsylvania, 576

F.Supp. 1178, 1182 (W.D.Pa. 1983). In addition, the court finds that the CJD is entitled to Eleventh Amendment immunity. The CJD is created pursuant to the Pennsylvania Constitution. Pa. Const. art. 5, § 18(b). Appointments to the CJD are made by the Supreme Court and the Governor. Id. art. 5, § 18(b)(1). The CJD's funding is part of the Supreme Court budget, which flows directly from the budget for the judicial branch as approved by the Pennsylvania legislature. Any judgment obtained against the CJD would be paid out of state funds. Accordingly, the court will dismiss Larsen's claims against the Supreme Court and the CJD because it finds they are immune from suit pursuant to the Eleventh Amendment. [FN9]

FN9. Although the Administrative Office of the Pennsylvania Courts argues that it is entitled to Eleventh Amendment Immunity, the AO's arguments were conclusory and provide little basis for the court to conclude at this juncture that this is so. Accordingly, the court will deny the AO's motion to dismiss based on Eleventh Amendment grounds.

The individual members of the Senate, Supreme Court, the CJD, the JCB and Defendants Frankforter and Sobolevitch also argue that they are entitled to Eleventh Amendment immunity. [FN10] Larsen has sued these Defendants in both their official and personal capacities. The Eleventh Amendment does not insulate Defendants from Larsen's claims against them in their personal capacities. Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). This is also true for Larsen's claims for punitive damages against Defendants as well. Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). [FN11]

FN10. Larsen has dismissed his claims against the JCB and its individual members in their personal capacities.

FN11. The complaint alleges that Larsen is suing both the Supreme Court, as a body, and the CJD, as a body, in their "personal" capacities. (Compl. at 30. ¶¶ (4), (6).) Neither of these entities exist in anything other than their "official" capacity and Larsen's attempt to sue the bodies in their "personal" capacities is misplaced and his claims against them in this regard will be dismissed.

"[W]hen a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief." Pennhurst, 465 U.S. at 102-03, 104 S.Ct. at 909 (citing Edelman, 415 U.S. at 666-67, 94 S.Ct. at 1357). Larsen asks the court to "void" the Senate Defendants' impeachment verdict of guilty, the Supreme Court Defendants' appointments to the JCB, the CJD Defendants' interim order suspending him without pay, and enjoin Defendants Sobolevitch and Frankforter's from failing to reinstate his lifetime medical insurance benefits. [FN12] (Compl. at 29 ¶¶ (1), (3), (5).) In determining whether Larsen's claims are barred by the Eleventh Amendment, the court must determine whether his claims against the individual members in their official capacities are retrospective or prospective in nature. The court finds that they are.

FN12. Larsen also asks the court to void the JCB and CJD Defendants' "action of interfering with [his] right to practice law." (Compl. at 29 ¶ (3).)

Larsen's request that the court void the Senate members' impeachment verdict of guilty is, in essence, a

request for prospective reinstatement or a direction to the members that they rescind their guilty verdict. Thus, the relief Larsen seeks against the individual Senate Defendants in their official capacities is not prohibited by the Eleventh Amendment. See Warnock v. Pecos County, Tex., 88 F.3d 341, 343 (5th Cir.1996) (claims for prospective reinstatement not barred by Eleventh Amendment); Cross v. State of Ala., 49 F.3d 1490, 1503 (11th Cir.1995) (district court properly enjoined state officials from failing to reinstate state employees); Russell v. Dunston, 896 F.2d 664, 668 (2d Cir. 1990) (existence of past harm does not render prospective injunction retrospective relief barred by Eleventh Amendment); see also Berman Enterprises, Inc. v. Jorling, 3 F.3d 602, 606-07 (2d Cir.1993) (claim for declaratory relief seeking to vacate state officials' administrative orders not barred by Eleventh Amendment); Nix v. Norman, 879 F.2d 429, 433 (8th Cir.1989) (Eleventh Amendment did not bar request for injunctive relief that state officials remove false allegations from employment record); Darlak v. Bobear, 814 F.2d 1055, 1061 (5th Cir.1987) (request for injunctive relief requiring state officials to rescind suspension not prohibited pursuant to Eleventh Amendment). The court also finds that the Eleventh Amendment does not bar Larsen's claims for declaratory and injunctive relief against the individual members of the Supreme Court, the JCB, the CJD and Defendants Frankforter and Sobolevitch in their official capacities. These claims include Larsen's requests that the court: (1) vacate the Supreme Court Defendants' appointments to the JCB and CJD; (2) vacate the CJD Defendants' order suspending him without pay; (3) enter a declaratory judgment as to the JCB and CJD Defendants' authority to act with regard to his right to practice law; and (4) enjoin Defendants Sobolevitch and Frankforter from failing to reinstate his lifetime medical insurance benefits. Accordingly, the court will deny the individual Senate

Defendants', the Supreme Court Defendants', the CJD Defendants' and JCB Defendants', and Defendants Frankforter's and Sobolevitch's motions to dismiss Larsen's claims for declaratory and injunctive relief against them in their official capacities.

E. Legislative Immunity

The Senate Defendants assert that they are absolutely immune from suit in their personal capacities based on the doctrine of absolute legislative immunity. Legislators are entitled to absolute immunity for actions taken in their legislative capacity. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 406, 99 S.Ct. 1171, 1179-80, 59 L.Ed.2d 401 (1979); Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). Larsen argues that the Senate Defendants are not entitled to absolute legislative immunity because the Senate impeachment proceeding did not constitute a legislative act.

The purpose of affording legislators absolute immunity is so that they "are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." Tenney, 341 U.S. at 377, 71 S.Ct. at 788. Thus, the Supreme Court has held that legislators are immune from suits against them in their personal capacities if they "were acting within the legitimate sphere of their legislative activity." Id. at 376, 71 S.Ct. at 788. While it is true that a conviction of impeachment may not involve "policy-making," Acierno v. Cloutier, 40 F.3d 597, 610 (3d Cir.1994), conducting impeachment trials is one of the responsibilities charged to the United States and Pennsylvania legislatures and is within the legitimate sphere of legislative activity. Indeed, no other governmental body possesses such responsibility.

Larsen cites Government of V.I. v. Lee, 775 F.2d 514, 520-21 (3d Cir.1985), in support of his argument that legislative immunity shields legislators from suit only for acts done in the process of enacting legislation. The issue in Lee was whether legislative fact-finding is the type of activity protected by legislative immunity. The Third Circuit held that it is, stating "fact- finding occupies a position of sufficient importance in the legislative process to justify the protection afforded by legislative immunity." Id. at 521. It appears from the court's review of the case law that virtually all of the cases which address the question of whether legislators are entitled to legislative immunity are cases in which legislators were engaged in activities that are accurately characterized as prerequisites to, or ancillary to, the ultimate legislative acts of proposing, debating, and passing legislation. See Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504-05, 95 S.Ct. 1813, 1822, 44 L.Ed.2d 324 (1975) (members of Congress shielded by legislative immunity in issuing subpoena in context of authorized congressional investigation); Tenney, 341 U.S. at 377-78, 71 S.Ct. at 788-89 (state legislative committee investigation into "un-american" activities within legitimate sphere of legislative activity). The activities engaged in by the Senate Defendants in the present case were also prerequisites to, or ancillary to, the legitimate legislative act of impeachment. In conducting the impeachment proceedings, the Senate Defendants "were acting in a field where legislators traditionally have power to act." Tenney, 341 U.S. at 379, 71 S.Ct. at 789. Pursuant to the United States Constitution, the United States Senate is granted sole authority to conduct impeachment trials. Nixon v. United States, 506 U.S. 224, 229, 113 S.Ct. 732, 735-36, 122 L.Ed.2d 1 (1993). The Pennsylvania Constitution grants similar authority to the Pennsylvania Senate. Pa. Const. art. 6, § 5 ("All impeachments shall be tried by the Senate."). The fact that legislators are not often called upon to conduct

impeachment proceedings does not make their actions any less legislative in nature than those actions undertaken in passing legislation. All of the conduct by the Senate Defendants of which Larsen complains was undertaken in pursuit of the impeachment proceedings against him. In order to remove the Senate members actions from the shield of legislative immunity, Larsen would need to allege that their actions in some way "usurp[ed]" the impeachment authority vested in them by the Pennsylvania Constitution. Tenney, 341 U.S. at 378, 71 S.Ct. at 789. Larsen makes no such allegation. Accordingly, the court finds that dismissal of Larsen's claims against the Senate Defendants in their personal capacities is proper because they are entitled to absolute legislative immunity.

F. Abstention

(1) The CJD and JCB Individual Defendants

The CJD and JCB Defendants argue that given the current proceedings pending before it, the court should abstain from hearing Larsen's claims against them pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

The proceedings currently before the CJD were instituted on April 18, 1994 when the JCB filed an application with the CJD for an interim order directing that Larsen be suspended from his duties without pay. The basis underlying the JCB's application was Larsen's conviction on April 9, 1994 in the Allegheny Court of Common Pleas finding Larsen guilty on two counts of criminal conspiracy under the Controlled Substances Act. On May 5, 1994, Larsen filed an answer with new matter to the JCB's application. On May 16, 1994, the JCB filed a response to

new matter. On May 25, 1994, the CJD conducted a hearing on the JCB's application. The jury's verdict against Larsen was admitted into evidence. Larsen's counsel moved that the hearing be bifurcated in order to allow the introduction of testimony at a later date. The CJD denied the motion. On June 3, 1994, the CJD granted the JCB's application and entered an order directing Larsen's suspension without pay. In re Justice Rolf Larsen, 655 A.2d 239 (C.J.D.1994). On June 6, 1994, the JCB filed with the CJD a "Board Complaint--Formal Charges" against Larsen. Larsen maintains that the JCB Defendants have wrongfully asserted that they have the right to seek the revocation of Larsen's right to practice law and that their decision to lodge charges against him was in retaliation for his prior protected statements regarding Justices Zappala, Cappy and Chief Justice Nix. Larsen claims that the CJD Defendants acted without authority in entering the interim order suspending Larsen without pay. Specifically, he claims that because the Pennsylvania Constitution permits the interim suspension of judicial officers only in instances where a justice has been indicted or charged with a felony, the CJD's order suspending Larsen based on his two criminal convictions was improper. Larsen also alleges that the CJD Defendants have "wrongfully asserted" that they have authority over his right to practice law in the Commonwealth of Pennsylvania. Furthermore, Larsen maintains that the CJD Defendants were motivated to issue the interim order based on Larsen's prior statements in his petitions for disqualification and recusal. Larsen seeks an order from this court voiding the CJD's June 3, 1994 order, "voiding the action of interfering with [his] right to practice law," (Compl. at 29, ¶ 3), and awarding damages against the individual members of the CJD in their personal capacities.

"Younger v. Harris ... and its progeny espouse a strong federal policy against federal-court interference with

pending [state] judicial proceedings absent extraordinary circumstances." Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982). The policies underlying abstention include " 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.' " Id. (quoting Younger, 401 U.S. at 44, 91 S.Ct. at 750). "The policies underlying Younger are fully applicable to noncriminal judicial proceedings when important state interests are involved." Middlesex County, 457 U.S. at 432, 102 S.Ct. at 2521. The Supreme Court has applied Younger in the context of attorney disciplinary proceedings, Middlesex County, 457 U.S. at 432, 102 S.Ct. at 2521, and the Third Circuit has applied Younger in the context of judicial removal proceedings, Coruzzi v. State of New Jersey, 705 F.2d 688, 690 (1983).

The Supreme Court has outlined three relevant areas of inquiry in determining whether abstention under Younger is appropriate. First, is there an ongoing state judicial proceeding? Second, does the proceeding implicate important state interests? Third, does the plaintiff have an adequate opportunity to raise his constitutional challenges in the context of that proceeding? Middlesex County, 457 U.S. at 432, 102 S.Ct. at 2521.

(a)The Existence of an Ongoing State Judicial Proceeding

Further CJD proceedings relating to the formal charges against Larsen have been stayed at his request. [FN13] (See Defs.' Ex. S, Joint Motion for Continuance, In re Larsen,

CJD No. 4 JD 94.) In addition, the CJD proceedings are also pending with respect to the CJD's interim order because it permits Larsen to move for modification or vacation of the order based on changed circumstances. In re Larsen, 655 A.2d at 243, 249. Larsen opines that there is presently no proceeding against him because the CJD's interim order is not appealable. Pa. Const. art. 5, § 18(d)(2). Larsen's argument is without merit as the CJD's order specifically permits him to seek modification of the order under the appropriate circumstances. Moreover, Larsen himself has consented to stay the formal proceedings against him, of which the interim order is a component. The means by which to challenge the lodging of charges against him and the granting of the interim order are readily available to Larsen through the resumption of the proceedings before the CJD relating to the JCB's formal complaint against him.

FN13. In evaluating the merits of Defendants' motions, the court has relied on documents outside of the complaint which are referred to in the complaint or which are public records. Both categories of documents are the types of documents which the court may properly consider without converting the instant motions to dismiss to motions for summary judgment. Pension Benefit Guarantee Corp. v. White Consolidated Indus. Inc., 998 F.2d 1192, 1196 (3d Cir.1993).

The court also finds that the proceedings in front of the CJD, including both the proceedings leading up to the issuance of the interim order and the proceedings relating to the JCB's formal complaint, are judicial in nature "since [they] bea[r] several of the indicia of a judicial action." Coruzzi, 705 F.2d at 690. The JCB instituted interim proceedings against Larsen by filing an application, akin to a motion for a preliminary injunction. Larsen filed an answer

and new matter and the JCB filed a response. The CJD subsequently conducted a hearing on the JCB's application. At the hearing, Larsen was represented by counsel and was offered the opportunity to take the stand as a witness on his own behalf, although he declined to do so. In re Larsen, 655 A.2d at 242. Furthermore, the JCB initiated formal proceedings against Larsen with the filing of a complaint pursuant to Article 5, Section 18(a)(7). Proceedings before the CJD proceed in accordance with the law of evidence and parties appearing before the court have the right to discovery, to subpoena witnesses and to compel the production of documents, books, accounts, and other relevant records. Pa. Const. art. V, § 18(b)(5). Parties appearing before the CJD are presumed innocent and all decisions of the CJD are to be in writing and contain findings of fact and conclusions of law. Id.

Additionally, the removal proceedings against Larsen are judicial in nature because they require the CJD to "investigate, declare, and enforce liabilities as they stood on present or past facts and under laws supposed already to exist." Coruzzi, 705 F.2d at 690-91 (internal quotations and alterations omitted).

(b) The Existence of Important State Interests

It is clear that "[Pennsylvania's] interests in assuring the ethical conduct of its judges and maintaining the integrity of its judiciary are no less significant," Coruzzi, 705 F.2d at 691, than the interest the State of New Jersey possessed in "maintaining and assuring the integrity of the attorneys it licenses," Middlesex County, 457 U.S. at 434, 102 S.Ct. at 2522. Granting the relief requested by Larsen would "substantially interfere with the state's removal proceeding accompanied by a suspension without pay, by preempting the

adjudication of a claim that could have been raised in that proceeding." Coruzzi, 705 F.2d at 691.

(c) Larsen's Opportunity to Raise his Constitutional Claims Before the CJD

The court does not find that Larsen is precluded from raising his constitutional claims before the CJD. The court notes that the only two federal constitutional claims which Larsen raises regarding the CJD Defendants' authority to act are (1) his rather amorphous claim that the Supreme Court improperly appointed members to the CJD and, therefore, that the CJD's decision to issue its interim order was in violation of Larsen's due process and equal protection rights, and (2) his claim that the CJD impermissibly relied upon his prior statements in his petitions for the disqualification and recusal of Justices Zappala and Cappy when the CJD decided to issue the interim order. Larsen's remaining claims relate to whether the JCB and CJD Defendants' actions were proper under the Pennsylvania Constitution and whether they have the authority to pursue the revocation of his right to practice law. Larsen's ability to litigate his state constitutional claims before the CJD are not of concern to the court in evaluating whether abstention is proper. [FN14] Middlesex County, 457 U.S. at 434, 102 S.Ct. at 2522 (deciding whether abstention appropriate based on whether plaintiff has adequate opportunity to raise federal challenges).

FN14. Several of the state claims Larsen raises in the complaint relating to the CJD's authority to act were considered and decided by the CJD in its decision underlying the issuance of the interim order. In re Larsen, 655 A.2d at 242-46. Thus, the Rooker-Feldman doctrine would likely deprive the court of jurisdiction to entertain Larsen's claims contained in paragraphs ninety-two and ninety-three of the

complaint were it inclined to address the merits of his claims. Additionally, Larsen's argument that the CJD cannot properly consider whether it has jurisdiction to act is completely without merit. A court is under the obligation at all times to determine whether it has jurisdiction over a particular case and to take particular action, regardless of whether either of the parties before it have raised such a challenge.

The CJD's opinion underlying the interim order does not indicate that Larsen attempted to raise to the CJD either of the federal constitutional challenges he seeks to raise in this court. From the CJD's exhaustive consideration of Larsen's state law claims, nothing in the court's opinion suggests it would fail to hear Larsen's federal constitutional claims. To the contrary, the CJD's opinion evidences that it gave a great deal of consideration to all of Larsen's state law claims.

The court finds that Larsen has not established that he will be unable to raise his federal constitutional claims before the CJD. First, Larsen's claims that the Supreme Court has improperly appointed members to the JCB and the CJD is more appropriately asserted against the Supreme Court and not the CJD and its individual members or the JCB's individual members. See infra § (F)(2).

Second, if Larsen intends to make allegations of bias by the CJD and JCB Defendants he has offered no reason why he cannot assert such claims before the CJD just as litigants in this court must raise their claims of judicial bias by filing a motion for recusal.

Larsen's claims of bias by the JCB would also be properly raised before the CJD as claims of prosecutorial bias.

In addition, Larsen has not demonstrated that the ongoing CJD proceedings will not afford him the opportunity to raise his First Amendment retaliation claims. Again, if Larsen is asserting these claims as a means of alleging bias on behalf of the CJD, the JCB or their members, he has articulated no reason why his situation is any different than any other litigant who is required to raise such claims in the tribunal before which he is appearing. Larsen claims that the CJD is not authorized to determine federal constitutional questions. However, nothing in the Pennsylvania Constitution prohibits the CJD from hearing such claims. The fact that the CJD is comprised of non-judges and non-lawyers provides an insufficient basis upon which to conclude that the proceedings before the CJD will not afford him an opportunity to litigate his constitutional claims. See Middlesex County, 457 U.S. at 435, 102 S.Ct. at 2523 (noting not all members of ethics committee conducting attorney disciplinary proceedings were lawyers).

Because the court finds that abstention is appropriate under Younger v. Harris, it will dismiss Plaintiff's claims against the individual JCB Defendants and the individual CJD Defendants in their official capacities.

(2) The Individual Supreme Court Defendants, Administrative Office of the Courts, and Defendants Sobolevitch and Frankforter

The court also finds that abstention is proper with regard to Larsen's claims asserted in parts II(a) & (b) of the amended complaint against the individual members of the Supreme Court. In part II(a), Larsen alleges that the Supreme Court Defendants' appointments to the CJD "were done in an improper manner to deny [him] due process of law and equal protection of the law in the within proceedings." (Compl. ¶

97.) Furthermore, Larsen claims that "[s]ome members of the ... CJD were appointed to serve because they had close ties to members of the Supreme Court, with the result that Justice Larsen was denied due process of law and equal protection of the law." (Id. p 98.) In part II(b), Larsen alleges that his statements regarding Justices Cappy, Zappala and Chief Justice Nix were substantial or motivating factors in the Supreme Court Defendants' decisions to appoint certain members to the CJD and JCB.

Although Larsen does not allege in part II(a) the specific injury he suffered as a result of the Supreme Court Defendants appointment of CJD and JCB members in an "improper manner" the court can discern only two possible injuries of which he could complain, that of bias or some impropriety in the CJD Defendants' issuance of the interim order suspending him without pay and/or impropriety in the JCB Defendants' decision to proceed against him. The court's interpretation of the amended complaint is bolstered by Larsen's contention in part II(b) that as a result of the Supreme Court Defendants taking into account his prior protected speech, he "was injured in that he was suspended without pay and improper action was taken against him with respect to his right to practice law." (Id. p 103.) Thus, the injury which Larsen claims he suffered as a result of the Supreme Court Defendants' appointments is the lodging of charges against him and the improper issuance of the interim order.

Abstention with regard to these claims is mandated by the fact that a determination of Larsen's allegations would necessarily involve an evaluation of whether the JCB Defendants acted with bias in seeking the interim order and filing a formal complaint against Larsen and whether the CJD acted with bias or improper intent in issuing the interim

order. To evaluate these claims would require the court to interfere with the ongoing removal proceedings. The court has already found that the existence of these ongoing state proceedings requires the court to abstain from entertaining Larsen's claims against the CJD and JCB Defendants and that Larsen has failed to demonstrate why the proceedings before the CJD do not afford him the opportunity to raise his claims of bias. Thus, abstention with regard to Larsen's allegations against the individual members of the supreme court in parts II(a) and (b) is also proper. [FN15]

FN15. The court recognizes that Larsen seeks to have this court void the supreme court's appointments to the CJD and JCB, a remedy which neither the CJD nor the JCB can provide. The only basis upon which to conclude that such a remedy would be appropriate would be a decision by the court that Larsen had been injured as a result of the improper manner in which the supreme court made appointments to the CJD and JCB. Making such a determination would require the court to intercede in the ongoing state proceedings and review the proceedings for bias on behalf of the CJD and/or the JCB.

G. Failure to State a Claim

The Senate Defendants argue that dismissal of Larsen's claims against them in their official capacities is proper based on his failure to allege facts which, if proven, would entitle him to relief. Larsen asserts two separate claims against the Senate Defendants. Larsen claims that he had both property and liberty interests in his position as a supreme court justice and in not being barred from holding office. Accordingly, he alleges that the Senate Defendants' impeachment of him violated his right to due process pursuant to the Fourteenth Amendment to the United States

Constitution. Larsen also avers that the Senate impeachment proceedings were subject to the procedural protections of the Sixth Amendment, which he claims were not adhered to in the impeachment process. The court will address Larsen's allegations seriatim.

(1) Deprivation of Property Interest

The Senate Defendants argue that Larsen did not possess a property interest in his position as a supreme court justice and that they were not required to comport with constitutional due process protections in impeaching him.

Whether or not Larsen had a property in interest in his position is a question properly answered by looking to Pennsylvania law. Independent Enterprises Inc. v. Pittsburgh Water and Sewer Auth., 103 F.3d 1165, 1177 (3d Cir.1997) (citing Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). Thus, "[a]ccording to the teachings of Roth ... [Larsen] may not pursue [his] procedural due process claims ... unless an independent source such as state law affords [him] a legitimate claim of entitlement" to his post as a supreme court justice. Independent Enterprises, 103 F.3d at 1177 (internal quotations omitted). Larsen cites to no state law as the source of his alleged property right.

Defendants, on the other hand, point to several decisions by the Pennsylvania Supreme Court which make clear that in Pennsylvania, an elected official possesses at best a "highly circumscribed" interest in his office. Sweeney v. Tucker, 473 Pa. 493, 375 A.2d 698, 713 (1977); see also In re 1991 Pennsylvania Legislative Reapportionment Comm'n, 530 Pa. 335, 609 A.2d 132, 140-41 (1992).

Indeed, in In re Legislative Reapportionment Comm'n,

the Pennsylvania Supreme Court explicitly stated that "elected officials' interest in their offices does not merit constitutional protection." 609 A.2d at 141. In discussing whether a state legislator possesses a property interest in his office entitling him to procedural due process protections prior to his expulsion from the legislature, the court in Sweeney stated:

> "An elected office is a public trust, not the private domain of the officeholder.... He holds office for the benefit of his constituents and cannot justifiably rely on a private need or expectation in holding office. He is periodically accountable to his constituents through the electoral process. Due to the paramount public interest in the integrity of the legislative process, the Pennsylvania Constitution provides for expulsion by two-thirds vote of the representatives of the people of the entire state."

A member of the Legislature is thus subject to the political process at all times. This is properly so for the public interest in the office far outweighs any private interest of the officeholder. An elected official can never have tenure in the same sense as an ordinary public employee. 375 A.2d at 713 (emphasis added). Larsen argues that Sweeney and In re 1991 Reapportionment Comm'n are distinguishable from the instant case because they did not address supreme court justices' entitlement to office. He opines that because supreme court justices are elected for ten year terms and may be appointed by the governor to complete an unexpired term of a justice who resigns, retires or dies, justices are not "subject to the political process at all times."

Larsen overlooks the fact that supreme court justices are subject to impeachment by a two-thirds vote of the Senate just as a member of the legislature is subject to expulsion by

a two-thirds vote of either house of the Pennsylvania legislature. Thus, Larsen, like the legislator in Sweeney, is in fact "subject to the political process at all times." Additionally, although as elected officials supreme court justices do not represent their constituents by instituting public policy in the same manner as legislators, i.e. enacting legislation, they hold office "for the benefit of their constituents" because their constituents have elected them to dispense justice in accordance with the principles they have expressed publicly in seeking judicial office. Thus, as in the case of state legislators, the "public interest" in the office of a supreme court justice "far outweighs any private interest of the [justice]" himself. Sweeney, 375 A.2d at 713.

In support of his position that he had a property interest in his position, Larsen cites Guarino v. Larsen, 821 F.Supp. 1040 (E.D.Pa.), rev'd on other grounds, 11 F.3d 1151 (3d Cir.1993). Guarino involved a claim by Judge Guarino, a retired Court of Common Pleas judge on active service, that the Pennsylvania Supreme Court's revocation of his senior judge status without prior notice of any charges against him violated his due process rights. The district court held that Judge Guarino had a property right in being a senior judge until the expiration of his term of appointment and pursuant to the Pennsylvania Constitution, as a justice of the Pennsylvania Supreme Court. Judge Guarino had been removed from the bench pursuant to an order issued by then Justice Larsen. In concluding that Judge Guarino had a property right as a supreme court justice, the district court relied upon Article 5, Section 18 of the Pennsylvania Constitution which provides for the removal of judicial officers through the procedure involving the JCB and the CJD. The court concluded that because Justice Larsen had removed Judge Guarino from his duties without following the procedures outlined in Section 18, the supreme court had

denied Judge Guarino of due process.

The district court in Guarino concluded that Guarino possessed a property right "based on the due process guarantee provided to all Pennsylvania justices and judges under the Constitution of Pennsylvania." 821 F.Supp. at 1057. This court presumes that the court in Guarino was relying upon Article 5, Section 18 in reaching its conclusion. This court, however, is not inclined to reach a similar conclusion in the instant case. The district court's opinion in Guarino does not address the Pennsylvania Supreme Court's decisions in Sweeney and In re 1991 Reapportionment Comm'n in which the supreme court clearly stated that an elected official's property interest in his or her position is at best "highly circumscribed." Moreover, the mere existence of procedural protections, like the procedures outlined in Article 5, Section 18, are insufficient to create a property interest in one's post. "The existence of a property interest in employment turns on the substantive protection afforded the employee under state law, not the procedural protection." Blanding v. Pennsylvania State Police, 12 F.3d 1303, 1306 n. 2 (3d Cir.1993). A public employee has a property interest in his job if state law provides that the employee may only be terminated for cause. Id. at 1306. Thus, to the extent that the district court in Guarino relied exclusively upon the procedures outlined in Article 5, Section 18 in concluding that Guarino possessed a property interest in his position, this court respectfully declines to adopt its reasoning.

The court recognizes that in reaching its conclusion, the Guarino court have relied on the "for cause" bases for the removal of judicial officers delineated in Article 5, Section 18 of the Pennsylvania Constitution. Again, however, based on the Pennsylvania Supreme Court's decisions in Sweeney and In re 1991 Reapportionment Comm'n, this court does not

find that the "for cause" grounds listed in Section 18 afforded Larsen an unqualified property interest in his office.

In Sweeney, the Pennsylvania Supreme Court held that legislators possessed a highly circumscribed interest in their offices despite the fact that the Pennsylvania Constitution contains the following language:

> "Each House shall have power to determine the rules of its proceedings and punish its members or other persons for contempt or disorderly behavior in its presence, to enforce obedience to its process, to protect its members against violence or offers of bribes or private solicitation, and, with the concurrence of two-thirds, to expel a member, but not a second time for the same cause.... Pa. Const. art. 2, § 11."

This paragraph, which the court reads as a "for cause" provision, is no different than provisions governing the removal of judicial officers contained in Article 5, Section 18(d)(1). [FN16] Thus, in Pennsylvania, despite the fact that the Pennsylvania Constitution delineates limited bases which would justify a public official's removal from office, the nature of elected office as a public trust and the fact that public officials are subject to the political process at all times means that an elected official may "never have tenure in the same sense as an ordinary public employee." Sweeney, 375 A.2d at 713. It is the Guarino court's failure to distinguish the Pennsylvania Supreme Court's decisions in Sweeney and In re 1991 Reapportionment Comm'n that permits this court to reach a different conclusion regarding whether justices of the supreme court possess an unqualified property interest in their elected office. Given the "highly circumscribed" nature of Larsen's interest in his position as a supreme court justice,

the court finds that for the most part, whatever procedural safeguards to which he was entitled pursuant to the Fourteenth Amendment were met by the impeachment proceedings.

FN16. Section 18(d)(1) reads: A justice, judge or justice of the peace may be suspended, removed from office or otherwise disciplined for conviction of a felony; violation of section 17 of this article; misconduct in office; neglect or failure to perform the duties of office or conduct which brings the judicial office into disrepute, whether or not the conduct occurred while acting in a judicial capacity or is prohibited by law; or conduct in violation of a canon or rule prescribed by the Supreme Court. Pa. Const. art. 5, § 18(d)(1). Section 17 prohibits judicial officers from practicing law, holding office in a political party or organization, or holding a position in the federal or state government. Pa. Const. art. 5, § 17(a). Section 17 also states "[j]ustices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court." Id. § 17(b).

The court notes that several of the claims made by Larsen appear to stem from his belief that the Senate was required to conduct the impeachment trial as this court would conduct a criminal trial. [FN17] The Supreme Court was confronted with a similar claim in Nixon v. United States, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993). In Nixon, former Chief Judge Nixon of the United States District Court for the Southern District of Mississippi argued that the United States Senate's procedure of appointing a committee to receive and hear evidence in impeachment proceedings violated the Constitution's requirement that the Senate "try" all impeachments because it prohibited most Senators from participating in the evidentiary hearings. 506

U.S. at 228, 113 S.Ct. at 735. The Court rejected Nixon's assertion that the word "try" imposes a requirement on the Senate that the proceedings be in the form of a judicial proceeding. Id. The Constitution specifies that when trying impeachments, Senators are to be under oath, that no person shall be convicted by less than a two-thirds vote, and that when the President is tried, the Chief Justice shall preside over the proceedings. The Court declined to infer additional constitutional limitations on the form of impeachment proceedings.

FN17. Larsen asserts, inter alia, that his due process rights were violated by the Senate delegating responsibility for the proceedings to the Senate impeachment committee. Larsen complains that, as a result, most members of the Senate did not hear the evidence presented against him. (Compl. ¶ 58(a).) He opines that "[g]iven the nature of the charge, the remoteness in time of the events alleged, motivation of witnesses, and the sharply conflicting testimony, due process required members of the Senate to hear and observe the witnesses testify in person." (Compl. ¶ 58(c).) See n. 19 infra for further allegations Which fail pursuant to the Court's reasoning in Nixon.

This court recognizes that the Nixon Court was concerned primarily with whether the federal impeachment clause lacked "judicially discoverable and manageable standards," thus demonstrating an intent by the framers to commit the authority to conduct impeachment proceedings to the Senate alone. Id. at 230-31, 113 S.Ct. at 736. The fact that the issue decided by the Court in Nixon was whether Nixon's challenge to the Senate impeachment proceedings constituted a nonjusticiable controversy, does not lessen the import of the Court's discussion in evaluating what precisely the United States Constitution, and by extension the

Pennsylvania Constitution, requires in the way of impeachment proceedings. Thus, the court concludes that although the Nixon Court ultimately concluded that it would not reach the merits of Nixon's challenge to his impeachment proceedings, it did so in part based on reasoning which is relevant in evaluating the merits of the allegations Larsen raises in the instant case.

The language in the Pennsylvania Constitution outlining the procedure to be followed by the Senate in conducting impeachment proceedings is quite similar to that contained in the United States Constitution. Article 6, Section 5 of the Pennsylvania Constitution reads, "[a]ll impeachments shall be tried by the Senate. When sitting for that purpose the Senators shall be upon oath or affirmation. No person shall be convicted without the concurrence of two-thirds of the members present." Larsen has proffered no reason why the court should interpret the word "tried" to require an impeachment proceeding in the nature of a judicial trial and depart from the reasoning articulated by the Supreme Court in Nixon regarding identical language in the United States Constitution. Article 6, Section 5 contains precisely the same two requirements for impeachment proceedings as the federal constitution--that the Senators shall be under oath when conducting impeachment trials and that no person shall be convicted on anything less than a vote of two-thirds of the members present.

The court's acceptance of the Nixon court's conclusion that the language "tried" does not require a judicial-type trial renders meritless several of Larsen's claims. First and foremost, Nixon demonstrates that Larsen did not have a right to have all of the Senate members present during the impeachment hearings. The Senate's delegation of the responsibility for conducting the proceedings to the committee

was constitutionally permissible. Thus, Larsen's allegations contained in paragraphs 58(a), (c), (d), (e), (i) of the amended complaint fail and will be dismissed. [FN18]

FN18. In paragraph 58(d), Larsen asserts that the committee and the Senate improperly proceeded without establishing a standard of proof. Paragraph 58(e) and (i), respectively, assert that the committee and the Senate failed to adopt rules of evidence for the proceedings and that Larsen was precluded from effectively cross-examining witnesses.

Dismissal of the allegations contained in paragraphs 58(a), (c), (d), (e), (i), in addition to other claims, is also proper due to Larsen's failure to establish that due process protections entitled him to these procedures. The question of what process Larsen was due in the context of his impeachment trial is not easily answered. Given Larsen's status as an elected official his interest in his position was not akin to the interest possessed by a public employee who possessed an unqualified constitutionally protected property interest in his job. Thus, although the court concludes that Larsen was entitled to some pretermination process, it does not find that he was entitled to the type of process afforded an employee who has an unqualified constitutionally protected property interest in his job.

Nevertheless, in determining whether Larsen has alleged impermissible deficiencies in the pretermination procedures he received, it is instructive to look to cases addressing due process claims brought by public employees who possess property interests in their job. As the following discussion will illustrate, even under the standards governing the procedural protections afforded employees with property interests greater than Larsen's, Larsen has failed to allege facts which, if proven, state a claim for a violation of due

process. The court will review the procedural protections to which public employees possessing property interests in their jobs are entitled.

The Supreme Court has described the "root requirement of the Due Process Clause as being that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985) (internal quotations omitted). "This principle requires some kind of hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment." Id. (internal quotations omitted) (emphasis added). A hearing is necessary in order to permit the employee an opportunity to "present his side of the case," id. at 543, 105 S.Ct. at 1494, and serves as "an initial check against mistaken decisions-- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action," id. at 545-56, 105 S.Ct. at 1495. The hearing may be informal--"a full evidentiary [and adversarial] hearing is not required." Curry v. Pa. Turnpike Comm'n, 843 F.Supp. 988, 992 (E.D.Pa.1994); see also Loudermill, 470 U.S. at 545, 105 S.Ct. at 1495. Also, a full hearing before the final decision-maker is not required. McDaniels v. Flick, 59 F.3d 446, 454 (3d Cir.1995), cert. denied, --- U.S. ----, 116 S.Ct. 1017, 134 L.Ed.2d 97 (1996). The employee may present "his side of the story" either orally or in writing. Loudermill, 470 U.S. at 546, 105 S.Ct. at 1495.

Furthermore, the notice to which an employee is entitled must provide "a sufficient explanation of the employer's evidence to permit a meaningful response." Fraternal Order of Police, Lodge No. 5 v. Tucker, 868 F.2d

74, 79 (3d Cir.1989). "The employee need not be informed of all the evidence, but must be given a meaningful opportunity to respond in the sense that he must know the substance of the case the employer has against him." Barkauskie v. Indian River Sch. Dist., 951 F.Supp. 519, 533 (D.Del. July 23, 1996). An employer is not required to present an employee with notice of the proffered reasons for termination prior to the hearing--"notice of the charges may be served at the time of the pretermination hearing." Curry, 843 F.Supp. at 992 (citing Edmundson v. Borough of Kennett Square, 4 F.3d 186 (3d Cir.1993)). The court will address each of Larsen's allegations in light of the standards outlined above.

Larsen claims that his due process rights were violated in that most members of the Senate did not participate in the impeachment hearings and, thus, did not hear the evidence presented against him prior to voting. (Compl. ¶ 58(a).) Due process does not require that Larsen receive a hearing before the final decision-maker. [FN19] McDaniels, 59 F.3d at 454. In addition, Larsen maintains that due process required the Senate Defendants to establish a standard of proof and/or rules of evidence. (Compl. ¶ 58(d), (e).) Larsen's claims fail since the due process clause does not require a formal evidentiary hearing prior to the dismissal of a public employee possessing a property interest in his job. Loudermill, 470 U.S. at 545, 105 S.Ct. at 1495; Curry, 843 F.Supp. at 992. For the same reason, Larsen was not entitled to cross-examine the witnesses testifying against him.

FN19. For the same reason, Larsen's claim that he was "denied the appearance of justice in that he was not informed at any time how the members of the Senate, other than members of the Committee, became acquainted with the evidence" also fails to allege a violation of due process.

(Compl. ¶ 59.)

In addition, Larsen claims procedural deficiencies in not being provided the opportunity to rebut or clarify the Senate committee's final report and call witnesses to testify in opposition to the findings contained therein. (Compl. ¶ 58(f).) He alleges that the final report was "misleading and did not accurately or fully represent the facts produced at trial," id. ¶ 58(g), and that the final report failed to make explicit findings of credibility, id. 58(b). Larsen's claims fail, however, because due process required only that he be afforded the chance to rebut the charges against him. Furthermore, as he is not entitled to a full-blown evidentiary hearing, due process does not require the committee to make explicit factual findings underlying its conclusions. Larsen does not maintain that the Senate Defendants failed to notify him of the charges against him or offer him the opportunity to rebut these charges. He concedes that throughout the hearings he was represented by counsel and that he was provided with the opportunity to present argument to the full Senate on his behalf. (Compl. ¶ 51.) Due process required nothing more. [FN20]

FN20. Larsen further alleges that his due process rights were violated in that the Senate found him guilty on article II yet acquitted him on article III. Article III accused Larsen of testifying falsely before the grand jury regarding the facts underlying the allegations contained in article II. Larsen does not proffer precisely what due process guarantees are violated by the Senate's alleged "inconsistent" findings and the court will dismiss this claim.

Larsen also alleges that his due process rights were violated because the Senate decided his pretrial motions after the impeachment proceedings, and because the Senate

Defendants denied his motion to continue the proceedings, thus depriving him of the opportunity to review all the evidence against him. (Compl. ¶¶ 58(l), (m).) Due process, however, does not necessarily require advance notice to the employee of the employer's underlying reasons for terminating an employee possessing a constitutionally protected property interest in his job. [FN21] Edmundson, 4 F.3d at 193. Furthermore, as already noted, the constitution does not require that the employee be informed of all of the evidence against him, just that he must know the substance of the charges against him. [FN22] McDaniels, 59 F.3d at 454. Because Larsen does not claim that the Senate Defendants failed to inform him as to the nature of the charges against him--indeed, the articles of impeachment were a matter of public record--his allegations do not state a claim for a violation of due process.

FN21. The court notes that even drawing all inferences from the complaint in favor of Larsen, he had access to the charges against him from at least May 18, 1994, the date on which the House of Representatives initially introduced the seven articles of impeachment. (Compl. ¶ 38.)

FN22. Larsen merely asserts that being unable to review the materials in and of itself violated his due process rights, without claiming any actual injury resulting, such as being unable to adequately rebut the charges against him.

Larsen also asserts several claims in which he appears to attack the impartiality of the Senators, and by extension, the Impeachment proceeding itself. Two of these allegations are easily disposed of. First, Larsen maintains that Senator Fumo appeared as a witness at the hearings and also participated in the proceedings as a member of the Senate, ultimately voting to convict. (Compl. ¶ 58(j).) Second,

Larsen alleges that "[a]nother Senator who harbored ambitions of being a Pennsylvania Supreme Court Justice, served as a member of the Committee and voted to convict." (Id. ¶ 58(k).) The court does not read the case law delineating the due process protections afforded public employees as prohibiting either of these factual scenarios in the context of pretermination procedures. Furthermore, the votes of these two Senators were hardly dispositive in the final Senate vote of forty-four to five to convict Larsen on article II or the unanimous Senate vote to bar him from holding public office in the future. (Id. ¶ 52.)

Larsen also alleges that "during the evidentiary hearings and closing arguments, [he] was precluded from establishing that adverse witnesses had ex- parte (sic) communications with members of the Senate and members of the Committee." (Id. ¶ 58(h).) Larsen does not claim that these alleged "ex parte" communications prohibited him from knowing the substance of the Senate's case against him, or that such communications resulted in a lack of impartiality by the Senate Defendants. Larsen's contention appears to be that the occurrence of such communications in and of itself violated his right to due process. The court finds that without more, the mere existence of communications between Senate members and witnesses outside of Larsen's presence, even if true, would not amount to a violation of due process.

Larsen alleges two procedural improprieties which if proven, may constitute a violation of due process under either the due process protections afforded a public employee possessing a property interest in his job or under the lesser protections governing the removal of public officers. Where an employee with a constitutionally protected property interest in his job receives only a pretermination proceeding, as opposed to a pretermination proceeding and posttermination

process, due process requires that the pretermination decision-makers be impartial. McDaniels, 59 F.3d at 458-60. Larsen claims that he "was precluded from establishing the effect that Legislative Initiative Grants had on the proceedings, Senators and adverse witnesses. Such grants, known as 'walking around money,' or 'WAMS,' are highly sought after discretionary funds awarded directly by individual Senators to whomever they want and are used to maintain voting discipline among the other Senators." (Compl. ¶ 58(n).) Larsen also asserts that he "was precluded from establishing that adverse witnesses, their agents, or relatives had made financial contributions to certain members of the Senate, including Senators who sat on the Committee." (Id. ¶ 58(o).) Larsen might be able to prove facts which would show that due to the receipt of funds either in the form of WAMS or financial contributions, Senators were predisposed to vote to convict him on the articles of impeachment. Larsen's allegations regarding the WAMS and financial contributions to each Senator constitute allegations regarding the impartiality of the decision-makers in the impeachment process. If Larsen could prove facts supporting his claim, this might constitute a deprivation of due process and, therefore, dismissal of these allegation is inappropriate. [FN23]

FN23. The court recognizes that should this case reach the discovery stage, discovery on these issues may require greater oversight by the court than exercised in most cases. Furthermore, Larsen will face a greater burden in demonstrating the viability of his claims regarding the WAMS and financial contributions at the summary judgment stage.

In sum, the court finds that the majority of deficiencies in the impeachment process which Larsen claims

constitute violations of due process are not based on rights to which he is entitled under the due process clause of the Fourteenth Amendment. Although in the preceding discussion the court has relied on case law which delineates the due process protections afforded employees who possess property rights in their jobs, Larsen's interest in his position as a supreme court justice entitles him to less protections than the due process protections provided to public employees who may only be terminated for cause. Larsen did not have "tenure in the same sense as an ordinary public employee." Sweeney, 375 A.2d at 713. Nevertheless, even under the standards governing pretermination proceedings for employees possessing unqualified property rights in their job, the majority of Larsen's claims fail as a matter of law. [FN24]

FN24. Although the court recognizes that federal law governs the determination of what process is due prior to the deprivation of a constitutionally protected property interest, it is worth noting that in Sweeney, the Pennsylvania Supreme Court held that "[g]iven the circumscribed nature of a legislator's private interest in his elected office and the overriding need for the Legislature to protect its integrity through the exercise of the expulsion power, it may be that the requirement of a two-thirds vote to expel by itself satisfies procedural due process." 375 A.2d at 713 (emphasis added). In this case, Larsen was not only impeached by a two-thirds vote of the Senate, but was also afforded numerous procedural protections.

Larsen also alleges that the Senate Defendants deprived him of his property right "in not being barred from holding office." (Compl. ¶ 55.) Larsen's allegation amounts to a claim that he possessed a property right to seek public office. In response to the Senate Defendants' motion to dismiss, Larsen points to no source of state law which would

create such a legitimate claim of entitlement and the court finds that his claim is meritless. Accordingly, the court will grant the Senate Defendants' motion to dismiss with respect to this claim. [FN25]

FN25. Larsen does not argue in his opposition brief that he possessed a property interest in having the right to seek public office and it appears that he has abandoned this claim to the extent the complaint can be read to assert such a claim.

It should be noted that the amended complaint does not specify whether Larsen is asserting a procedural or substantive due process claim. Both the Senate Defendants and Larsen address the arguments in their briefs only to the question of whether Larsen has stated a procedural due process claim. In order to maintain a substantive due process claim, Larsen would need to have alleged that the Senate Defendants "deliberately and arbitrarily abused its power," Independent Enterprises, 103 F.3d at 1179 (internal quotations omitted). In impeaching him, a claim that appears no where in the amended complaint. Furthermore, the court's finding that his interest in his position as a supreme court justice is highly circumscribed would negate Larsen's ability to maintain any such cause of action. The Third Circuit has stated that "a substantive due process claim grounded in the arbitrary exercise of governmental authority may be maintained only where the plaintiff has been deprived of a 'particular quality of property interest.'" Id. (quoting DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 600 (3d Cir.1995). Beyond stating that the particular quality of property right to which substantive due process protections attach includes "fundamental property interests" the Third Circuit has not delineated precisely the types of interests which are protected. Independent Enterprises, 103 F.3d at

1179. Nevertheless, the court finds that Larsen's highly circumscribed interest in his position as an elected supreme court justice does not qualify as the type of fundamental property interest warranting substantive due process protection.

(2) Deprivation of Liberty Interest

In addition to claiming that he possessed a property interest in his position as a supreme court justice, Larsen alleges that he possessed a liberty interest in his post as well. [FN26] He maintains that Defendants deprived him of his liberty interest without due process of law in violation of the Fourteenth Amendment.

FN26. Larsen also maintains that he possessed a liberty interest in not being barred from office. The court's finding that Larsen received all the process he was due in conjunction with Defendants' impeachment of him defeats this claim as well.

"The Supreme Court has held that a person has a liberty interest in employment actions which require due process 'where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him.' " Homar v. Gilbert, 89 F.3d 1009, 1022 (3d Cir. 1996), cert. denied, --- U.S. ----, 117 S.Ct. 678, 136 L.Ed.2d 604 (1997) (quoting Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972)). The court is unaware of any other liberty interest claim that Larsen could pursue in the context of challenging the process afforded him in the impeachment proceedings. Thus, although Larsen's amended complaint is somewhat unartfully drafted, the court construes it as an attempt to allege the type of claim recognized by the Supreme Court in Roth. Larsen's

allegation, however, must fail, for he fails to allege an essential element of a stigmatization claim. Larsen does not claim that the Senate Defendants' allegations against him were false and/or misleading. Fraternal Order of Police Lodge No. 5, 868 F.2d at 82. The court will, therefore, dismiss Larsen's claim that the Senate Defendants deprived him of a liberty interest in conjunction with its impeachment proceedings against him.

(3) Sixth Amendment

Larsen claims that the Senate impeachment proceedings violated his rights to an impartial fact-finder, confront witnesses, and assistance of counsel and other "process due" pursuant to the Sixth Amendment. The Senate Defendants have moved to dismiss Larsen's Sixth Amendment claims on the basis that the Sixth Amendment does not apply to impeachment proceedings.

The court agrees. The Sixth Amendment by its terms applies only to "criminal prosecutions." U.S. Const. Amend. 6. The proceedings against Larsen cannot under any circumstances be classified as criminal proceedings, therefore, his Sixth Amendment claims must fail. [FN27]

FN27. As already discussed, in Nixon the Supreme Court in dicta refused to find that the United States Constitution's mandate that the Senate "try" all impeachment proceedings required the Senate to conduct the proceedings in the nature of a judicial proceeding. 506 U.S. at 229-31, 113 S.Ct. at 735-37. The court stated that the Framers did not intend to impose upon the Senate additional limitations in the manner of conducting impeachment trials other than those listed in Article I, section 3, clause 6. Id. at 230, 113 S.Ct. at 736.

(4) First Amendment Retaliation

Larsen claims that the Senate Defendants violated his First Amendment rights in that their decision to proceed against him and to vote in favor of impeachment were motivated by his prior statements in his petitions for the disqualification and recusal of Justices Cappy and Zappala. The Senate Defendants argue that dismissal of this claim is proper because the Pennsylvania Constitution affords them no discretion in deciding whether to pursue impeachment proceeding.

The court agrees with the Senate Defendants that the Pennsylvania Constitution does not afford them the discretion to decline to conduct impeachment proceedings once the House of Representatives has voted. Article 6, Section 4 states that "[t]he House of Representatives shall have the sole power of impeachment." Pa. Const. art. 6, § 4. Thus, a plain reading of the constitution demonstrates that it is the House of Representatives alone which decides whether or not to impeach and institute proceedings against a public official. Once the House has acted to impeach, Article 6, Section 5 designates the Senate as the body which will conduct the impeachment trial. Pa. Const. art. 6, § 5. The constitution affords the Senate no authority to disregard a resolution of impeachment and decline to conduct an impeachment trial. Thus, the court will dismiss Larsen's claim that the Senate violated his First Amendment rights in deciding to conduct the impeachment trial against him. The Senate Defendants also move to dismiss Larsen's claim that his prior statements were substantial factors motivating their decision to vote against him. Defendants opine that because the article of impeachment on which Larsen was found guilty does not relate to his prior protected statements, [FN28] he has failed to state a claim for retaliation under the First Amendment.

FN28. The Senate Defendants do not challenge Larsen's claim that his statement in the petitions for disqualification and recusal are protected under the First Amendment and, thus, the court makes no finding in this regard in the instant memorandum.

In order to state claim for retaliation in violation of the First Amendment, a plaintiff must first demonstrate that he engaged in protected activity. Pickering v. Bd. of Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968). Next, a plaintiff must show that the activity or statements in question was a substantial or motivating factor in the government's alleged retaliatory action. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). A defendant may defeat the plaintiff's claim by showing by a preponderance of the evidence that absent the protected activity, the plaintiff would have suffered the same adverse action. Id.; Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir.1995). Defendants' argument that in order to state a claim for First Amendment retaliation Larsen must show that the adverse action taken against him relates to his prior protected statements has no support in the case law outlining the elements Larsen must prove in order to succeed on his claims. Accordingly, Defendants' argument provides no basis upon which to dismiss Larsen's First Amendment claims.

(5) Medical Insurance Benefits

In part III(a) of the amended complaint, Larsen asserts that the Supreme Court Defendants, the Administrative Office of the Courts, and Defendants Frankforter and Sobolevitch revoked his right to receive lifetime medical benefits in violation of his right to contract and his rights to due process and equal protection.

Larsen's claim regarding the discontinuation of his medical insurance benefits stems from Defendant Frankforter's June 17, 1994, notice to him, on behalf of all the Supreme Court Defendants, that as of June 3, 1994, he would no longer receive medical benefits pursuant to the Pennsylvania judiciary's "Fully State- Paid Basic and Specialized Coverage" insurance plan. Defendant Frankforter informed Larsen that Defendants were cancelling his medical benefits based on a 1993 amendment to Article 5, Section 16 of the Pennsylvania Constitution. The relevant portion of Article 5, Section 16 reads:

> "Except as provided by law, no salary, retirement benefit or other compensation, present or deferred, shall be paid to any justice, judge or justice of the peace who, under section 18 or under Article VI, is suspended, removed or barred from holding judicial office for conviction of a felony or misconduct in office or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute. Pa. Const. art. 5, § 16(b)."

Larsen claims that at the time the Supreme Court Defendants revoked his medical benefits, his right to receive such benefits had already vested. Larsen alleges that in January 1974, when he initially became a member of the Pennsylvania judiciary, one of the terms and conditions of his service was a medical plan that provided lifetime medical benefits for members of the judiciary with twenty or more years of service, regardless of age. On or about December 12, 1989, the Pennsylvania Supreme Court adopted a new medical insurance plan which provided lifetime medical benefits for members of the judiciary with ten or more years of service, regardless of age. As of December 12, 1989, Larsen had served as a member of the Pennsylvania judiciary

for more than ten years. Larsen argues that as a result of his ten years of service, his right to receive lifetime medical benefits upon separation from the judiciary vested on December 12, 1989. Defendants' revocation of his benefits, Larsen contends, violates the impairment of contracts clause of the United States Constitution and his rights to due process and equal protection.

In support of their motion to dismiss Larsen's impairment of contract claim, Defendants argue that in so far as the amended complaint alleges that on December 12, 1989 the Supreme Court "adopted a new medical insurance plan for retired members of the state judiciary," Larsen's claim fails because the amended complaint on its face demonstrates that the medical plan applied only to retired members of the judiciary. (Compl. ¶ 108, emphasis added.) Since Larsen was removed from office pursuant to the sentence imposed as a result of his criminal conviction, removed pursuant to the CJD's interim order and impeached, under the terms of the plan he was not entitled to receive lifetime medical benefits.

Defendants' argument fails. First, a determination of whether or not the terms of the medical insurance plan exclude Larsen as a potential beneficiary is not a question properly resolved on a motion to dismiss. The plan itself is not before the court. Larsen has alleged that he was covered by the terms of the plan and at the motion to dismiss stage the court is required to accept as true all factual allegations in the amended complaint.

Second, the Supreme Court Defendants did not cite the terms of the plan as the basis upon which they were relying in revoking Larsen's lifetime medical benefits. Defendant Frankforter cited Article 5, Section 16 of the Pennsylvania Constitution. Thus, in evaluating whether

Larsen has stated a claim for impairment of contract, the court is required to determine whether Defendants' proffered reasons provide a legitimate basis upon which to cancel Larsen's medical insurance.

The court finds that Larsen has alleged sufficient facts in the amended complaint to support a claim for impairment of contract under the federal constitution. The court's decision is based on prior decisions of the Pennsylvania Supreme Court.

The question of whether or not the Supreme Court Defendants may properly rely upon the newly enacted provision of Article 5, Section 16 of the Pennsylvania Constitution depends upon whether or not prior to its enactment, Larsen possessed a vested right to receive lifetime medical benefits upon his separation from the judiciary. In Pennsylvania, the law is well-settled that where a public employee's right to receive benefits has vested, any attempt to later interfere with that right constitutes an unconstitutional impairment of contract. Association of Pa. State College and Univ. Faculties v. State System of Higher Educ., 505 Pa. 369, 479 A.2d 962, 965 (1984) (citing cases); Miller v. Commonwealth, State Employees' Retirement Bd., 498 Pa. 103, 445 A.2d 88, 89 (1981). This principle is based on Pennsylvania's long-standing recognition that the right to receive retirement benefits is contractual because "retirement provisions for public employees is that of deferred compensation for service actually rendered in the past." Commonwealth ex rel. Zimmerman v. Officers and Employees Retirement Bd., 503 Pa. 219, 469 A.2d 141, 142-43 (1983). Vesting of public retirement benefits usually occurs when the employee, "having made all required contributions, has completed the number of years of service required for eligibility." Police Pension Fund Ass'n Bd. v.

Hess, 127 Pa.Cmwlth. 498, 562 A.2d 391, 395 (1989).

The issue of law that appears unsettled in Pennsylvania is whether the right to receive medical insurance benefits is a form of deferred compensation which, upon vesting, gives rise to unalterable contractual rights. Although several lower courts in Pennsylvania have held that medical insurance benefits are a form of deferred compensation, the Pennsylvania Supreme Court has never directly addressed the issue. See City of Chester v. Fraternal Order of Police, 150 Pa.Cmwlth. 235, 615 A.2d 893, 898-99 (1992) (medical insurance benefits form of deferred compensation for past services rendered); Newport Township v. Margalis, 110 Pa.Cmwlth. 611, 532 A.2d 1263, 1265-66 (1987) (applying theory of deferred compensation to medical insurance benefits); Township of Tinicum v. Fife, 95 Pa.Cmwlth. 516, 505 A.2d 1116, 1119-1120 (1986) (medical benefits as form of deferred compensation reflecting contractual rights); see also Turley v. John Hancock Mutual Life Ins. Co., 315 Pa. 245, 173 A. 163, 165 (1934) (recognizing vesting of employee's right to receive medical benefits without discussing whether benefits form of deferred compensation).

The court's review of the relevant case law reveals only three opinions by the Pennsylvania Supreme Court in which it has indirectly addressed the question of whether medical insurance benefits are a form of deferred compensation which, upon vesting, may not be altered retroactively. In Lower Merion Fraternal Order of Police Lodge No. 28 v. Lower Merion Township, the court addressed the question of whether an arbitrator's termination of post- retirement medical benefits to former township employees required the township to violate the First Class Township Act by requiring it to provide health coverage after retirement. 511 Pa. 186, 512 A.2d 612, 615 (1986). [FN29]

Three members of the court interpreted the Act as prohibiting Lower Merion from contracting to provide insurance coverage to anyone who was not a township employee and vacated the arbitrator's award on that basis. Id. (Zappala, J. and Flaherty, J. with Nix, C.J. concurring). However, in an opinion authored by former Justice Larsen and joined by former Justices Hutchinson and Papadakos, Larsen expressed the belief that post-retirement medical benefits are a form of deferred compensation "for the compensation foregone during active employment in exchange for benefits and security upon retirement." Id. 512 A.2d at 619.

FN29. Aside from citing to Lower Merion as a means of illustrating the supreme court's view on the issue of whether Pennsylvania law recognizes medical insurance benefits as a form of deferred compensation, the precedential value of the equally divided court's opinion is questionable given the court's later dismissal of the appeal on reargument as "having been improvidently granted." Lower Merion Fraternal Order of Police Lodge No. 28 v. Township of Lower Merion, 518 Pa. 118, 541 A.2d 738 (1988). The court did not, however, rescind its prior opinion.

The second case in which the Pennsylvania Supreme Court has commented on the issue of whether medical insurance benefits are a form of deferred compensation is In re Appeal of Upper Providence Police Delaware County Lodge No. 27 Fraternal Order of Police, 514 Pa. 501, 526 A.2d 315 (1987). The issue in Upper Providence was whether in directing the elimination of post-retirement hospital and medical benefits the arbitrator had exceeded his power. The Home Rule Act prohibits municipalities from diminishing former municipal employees' entitlement to benefits. Id. 526 A.2d at 322. In dicta, the supreme court noted that "[w]hile the [appellant] did not initially challenge

the arbitration award on constitutional grounds, elimination of these benefits ... would also pose serious constitutional problems." Id. at 322 n. 6. In support of this statement, the court cited to two of its prior opinions holding that amendments to the Commonwealth's retirement system impermissibly impaired employees' contract rights based on the fact that retirement benefits are a form of deferred compensation. Id. (citing Association of Pa. State College and Univ. Faculties, v. State System of Higher Education, 505 Pa. 369, 479 A.2d 962 (1984); Catania v. Commonwealth, State Employees' Retirement Bd., 498 Pa. 684, 450 A.2d 1342 (1982)). Former Justice Larsen authored the supreme court's opinion in Upper Providence and was joined by former Chief Justice Nix, former Justices McDermott, Hutchinson, Papadakos and present Chief Justice Flaherty and present Justice Zappala.

The third case in which the Pennsylvania Supreme Court indirectly addressed the issue of whether medical insurance benefits are a form of deferred compensation is Shiomos v. Commonwealth, State Employees' Retirement Bd., 533 Pa. 588, 626 A.2d 158 (1993). The issue in Shiomos was whether the Public Employee Pension Forfeiture Act as applied to former Court of Common Pleas Judge Shiomos constituted an unconstitutional impairment of contract under Article 1, Section 17 of the Pennsylvania Constitution. Enacted on July 8, 1989, the Forfeiture Act prohibits the payment of pension benefits to public employees convicted of any one of the crimes enumerated in the Act. Shiomos's entitlement to receive retirement benefits vested on July 30, 1979, when he was credited with the necessary ten years of service on the bench. Shiomos argued that since his right to receive his pension had vested prior to the commission of the criminal acts underlying his conviction, revoking his retirement benefits constituted an impermissible

impairment of his right to contract.

The supreme court agreed that had Shiomos retired at the end of his term in 1982 without assuming any additional public service duties "his pension contract would not be subject to the forfeiture provisions of [the Act], even though the Act was enacted before his right to receive his pension had vested." Id. 626 A.2d at 162. Shiomos had, however, assumed a second term of office after the enactment of the Act and, thus, took office for a second time subject to the terms of the Act and its applicability to public employees like himself. The court stated "whether or not a public employee's right to receive retirement benefits has vested, or he or she is in actual receipt of benefits, all previous accumulated rights to receive such benefits are subject to forfeiture by and through the renewed agreement which is formed each time a person chooses to become a public official as defined by [the Act]." Id. at 162-63. Justice Cappy authored the supreme court's opinion in Shiomos, joined by present Chief Justice Flaherty and present Justice Zappala, and former Chief Justice Nix. An issue not before the supreme court in Shiomos, but one that Shiomos had argued before the commonwealth court, was the legality of the Administrative Office of the Court's termination of Shiomos's medical coverage. On appeal, Shiomos only presented argument regarding the commonwealth court's order affirming the revocation of his right to receive his pension. The supreme court noted, however, that "[our] opinion shall only address the issues raised in [the case dealing with Shiomos's pension rights] as we agree with appellant's position that our decision in this case is dispositive of the issues in the companion appeals." Id. at 626 A.2d at 159 n. 4. Additionally, in noting the date on which Shiomos's pension would be forfeited, the court stated "the medical benefits of appellant Shiomos ... would also be forfeited." Id.

at 160 n. 7.

In the absence of a clear statement by Pennsylvania's highest court holding that the right to receive medical insurance benefits is a form of deferred compensation, this court is required to predict how it would rule. Rabatin v. Columbus Lines, Inc., 790 F.2d 22, 24 (3d Cir.1986). In reaching its conclusion, it is proper for the court to follow the decisions of intermediate state courts unless "other persuasive data" indicate that the Pennsylvania Supreme Court would rule differently. Fisher v. USAA Casualty Ins. Co., 973 F.2d 1103, 1105 (3d Cir.1992) (quoting West v. American Tel. & Tel. Co., 311 U.S. 223, 237, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940)). The decisions of lower Pennsylvania state courts are "indicia" of how the Pennsylvania Supreme Court would rule on the issue presently before this court. McGowan v. Univ. of Scranton, 759 F.2d 287, 291 (3d Cir.1985) (quoting Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1167 (3d Cir.1981)).

The court predicts that the Pennsylvania Supreme Court would hold that under the appropriate circumstances medical benefits may be a form of deferred compensation. Although not having had the occasion to squarely address the issue, the supreme court has implicitly suggested that medical benefits are a form of deferred compensation. In the instant case, assuming the veracity of the facts alleged in the complaint, Justice Larsen may ultimately be able to prove that his right to receive such benefits vested on December 12, 1989 and that Defendants' retroactive application of the 1993 amendment to Article 5, Section 16 impermissibly impaired his right to contract. Therefore, dismissal of Larsen's impairment of contract claims at this stage in the proceeding is inappropriate.

In addition, dismissal of Larsen's due process claim relating to the revocation of his medical insurance benefits is also improper. In support of dismissal, Defendants argue that Larsen did not have a contractual right to continue to receive state-paid medical insurance benefits. As the court has found that under Pennsylvania law, under the appropriate circumstances, medical benefits are a form of deferred compensation and that Larsen may be able to prove that his right to receive such compensation vested on December 12, 1989, Defendants' argument provides no basis upon which to dismiss Larsen's due process claim. [FN30]

FN30. Defendants also argue for dismissal of Larsen's due process claims based on the fact that he received all process he was due in his impeachment proceeding before the Senate, his criminal conviction, and his hearing before the CJD. Defendants' argument has no merit as none of these proceedings addressed the issue of the termination of Larsen's medical insurance benefits.

Defendants also move to dismiss Larsen's claim that Defendants have deprived him of equal protection of the laws in that other judges who qualified for lifetime benefits who were later removed from office under circumstances similar to his own continue to receive state-paid medical benefits. In support of dismissal, Defendants maintain that Larsen has failed to allege membership in a protected class which would afford him protection under the equal protection clause. The equal protection clause does not, however, prohibit only governmental actions that differentiate between "suspect" or "quasi-suspect" classes of individuals. Whether or not a plaintiff is a member of a suspect class determines the appropriate standard to be applied in evaluating the legitimacy of the state's actions. See Envirotech Sanitary Systems, Inc. v. Shoener, 745 F.Supp. 271, 280 n. 11 (M.D.Pa.1990)

(Conaboy, J.). Lack of membership in a protected class does not, however, relieve the government of the obligation to act reasonably in differentiating between groups of similarly situated individuals. Thus, since Larsen's equal protection claim involves neither the deprivation of a fundamental right nor discrimination based on a suspect classification, the court will ultimately evaluate his claims under the rational relationship test. Palmer by Palmer v. Merluzzi, 868 F.2d 90, 96 (3d Cir.1989). Determination of whether Defendants acted reasonably in depriving Larsen of his right to receive lifetime medical benefits as compared with other similarly situated individuals is inappropriate at this stage in the litigation and Defendants' motion to dismiss this claim will be denied. [FN31]

FN31. The individual Supreme Court Defendants, the Administrative Office of the Pennsylvania Courts and Defendants Sobolevitch and Frankforter also argue that dismissal of Larsen's claims against them is proper based on the doctrine of qualified immunity. The court will not consider the arguments of the Supreme Court Defendants to the extent that they relate to claims which, pursuant to Younger v. Harris, the court will dismiss. Furthermore, the AO and Defendants Sobolevitch and Frankforter's arguments in support of qualified immunity are limited to the same arguments they assert in support of the outright dismissal of Larsen's claims. As the court has determined that these arguments provide no basis upon which to dismiss Larsen's impairment of contract, due process and equal protection claims, they also provide no basis upon which to afford Defendants Immunity from suit in their personal capacities. Defendants will be free to renew their arguments at the summary judgment stage based on the relevant legal principles of law as discussed in this memorandum.

(6) PHSA Claims

In parts III(b) and (c) of the amended complaint, Larsen asserts that the Supreme Court Defendants, Defendant Administrative Office of the Courts, and Defendants Sobolevitch and Frankforter have denied him benefits under the Public Health Services Act ("PHSA"), 42 U.S.C. §§ 201 et seq., 42 U.S.C. §§ 300bb-1 et seq. 42 U.S.C. § 300bb-2(2) of the PHSA requires state and local government group health plans to provide continuation coverage for eighteen months to certain individuals upon termination of their employment. Such coverage must consist of coverage identical to the coverage provided under the group health plan to current employees. Larsen claims that Defendants have wrongfully denied him coverage pursuant to section 300bb-2(2) and that their decision to do so was unconstitutionally motivated by his prior statements regarding Justices Cappy, Zappala, and Chief Justice Nix. Defendants argue that Larsen was removed from office based on "gross misconduct," an express exception to the PHSA's requirement that state and local governments permit employees to pay a premium and participate in group health insurance for eighteen months after termination. 42 U.S.C. § 300bb-3(2). Furthermore, Defendants argue that even if Larsen prevailed on his section 300bb-1 claim, his claims are moot because the Eleventh Amendment prohibits the court from granting Larsen anything other than preliminary injunctive relief. Defendants opine that this would be outside the court's powers since any entitlement Larsen may have had to continued health care coverage would have expired on November 3, 1995.

In response, Larsen argues that he was not convicted for conduct relating to his position as a supreme court justice and, therefore, his case is distinguishable from the cases cited by Defendants in support of dismissal. [FN32] See Burke v.

American Stores Employee Benefit Plan, 818 F.Supp. 1131 (N.D.Ill.1993) (employee's termination for improper use of promotional materials constitutes gross misconduct and COBRA's provisions not triggered); Adkins v. United Int'l Investigative Services, Inc., No. C:91-0087 BAC, 1993 WL 345186 (N.D.Cal. March 27, 1993) (security guard's termination of employment for leaving post while on duty constituted gross misconduct under COBRA); Karby v. Standard Products Co., NO. 3:90-2918-17, 1992 WL 333931 (D.S.C. June 22, 1992) (employee's false statements on conflict of interest disclosure form and theft of company property constitutes gross misconduct); Avina v. Texas Pig Stands, Inc., No. SA-88-CA-13, 1991 WL 458848 (W.D.Tex. Feb. 1, 1991) (employee's termination for irregularities in handling cash, invoice irregularities and failure to improve performance of one of defendant's stores constitutes gross misconduct).

FN32. The cases cited by Defendants were all decided pursuant to the Consolidated Omnibus Budget Reconciliation Act or "COBRA" which is virtually a mirror image of the PHSA only it applies to private employers. 29 U.S.C. §§ 1161-68. Thus, cases interpreting the term "gross misconduct" under COBRA are appropriately used in interpreting the same term as it is used in the PHSA.

The court is not prepared at this juncture to make a definitive determination as to whether Larsen's convictions constitute gross misconduct within the meaning of section 300bb-3(2), although it is likely that the court will ultimately conclude that this is so.

The relevant question in determining whether Larsen committed gross misconduct is not merely whether he abused his position as a supreme court justice, but whether he

committed acts of misconduct as an employee of the Commonwealth generally. Larsen was convicted on two counts of conspiracy to obtain possession of controlled substances. In order to effectuate his crimes, he directed his staff employees to secure prescription drugs in their names and had them pay for the prescriptions using their National Prescription Administrators ("NPA") cards. NPA "is a drug benefit program administered by the NPA on behalf of the state judiciary for its employees." Commonwealth v. Larsen, 682 A.2d at 786 n. 2. Had Larsen carried out his unlawful acts without the assistance of state employees under his employ or the judiciary's benefit program, the court might be more likely, once it reached the issue, to conclude that his criminal activity was unrelated to his employment. [FN33]

FN33. At trial, at least two of Larsen's staff members testified that they carried out his requests in part because he was "the boss" and they felt they had no choice. Commonwealth v. Larsen, 682 A.2d at 786 n. 4.

The court need not, however, decide this issue at the present time for two reasons. First, if Larsen succeeds on his claim that Defendants have improperly revoked his right to receive lifetime medical benefits his PHSA claim will become moot. Second, the Senate impeached Larsen for improper ex parte communication with an attorney who had cases pending before the supreme court. This offense clearly constitutes gross misconduct relating to his employment and his position as a supreme court justice. If Larsen is unsuccessful on his claims that the Senate Defendants committed constitutional errors in the impeachment process, the impeachment verdict will stand. This would provide an independent basis for finding that Larsen is ineligible for PHSA continuation coverage and would moot his claims. [FN34]

FN34. Because the court finds that Larsen's PHSA claims may be moot depending upon the outcome of other issues in the case, the court will not address the issue of whether he has stated a claim for First Amendment retaliation in the denial of continuation coverage under the PHSA. Defendants also argue that Larsen's PHSA claims should be dismissed because the eighteen month continuation period has expired and the Eleventh Amendment prohibits the court from granting him retroactive monetary relief. The court does not agree that the expiration of the eighteen month period deprives it of authority to grant relief in this case. If this were true and the court were prohibited from granting equitable relief beyond the statutorily proscribed eighteen month limit, courts would be extremely limited in the relief they could afford under the PHSA. In addition, section 300bb-7 explicitly authorizes potential plaintiffs to "bring ... action[s] for appropriate equitable relief." 42 U.S.C. § 300bb-7.

H. Senate Defendants' Motion Pursuant to Rule 41(d)

The Senate Defendants have moved to recover the costs of Larsen's previously dismissed commonwealth court action pursuant to Federal Rule of Civil Procedure 41(d). Rule 41(d) states:

> "If a plaintiff who has once dismissed an action in any court commences an action based upon, or including the same claim against the same defendants, the court may make such order for the payment of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order. Fed.R.Civ.P. 41(d)."

The decision whether to stay an action and impose

costs pursuant to Rule 41(d) is within the broad discretion of the trial court. 5 Moore's Federal Practice p 41.16 at 41-185 (2d ed. 1996) (citing cases). "The purpose of the rule is to prevent the maintenance of vexatious law suits and to secure, where such suits are shown to have been brought repetitively, payment of costs of prior instances of such vexatious conduct." United Transp. Union v. Maine Central R.R. Co., 107 F.R.D. 391, 392 (D.Me. 1985).

The court will deny Defendants' motion. Although several of the claims Larsen asserts in the present action are similar to ones he raised before the commonwealth court, the two cases are hardly identical. As the court has already noted in its discussion regarding the applicability of the Rooker-Feldman doctrine, many of the claims that Larsen raises in the instant case are ones that arose out of the impeachment proceedings and, therefore, could not have been raised at the time he filed suit in commonwealth court. Additionally, in the commonwealth court action, Larsen sought primarily preliminary injunctive relief. Here, he seeks permanent injunctive relief after a full hearing on the merits of his amended complaint. See United Transp. Union, 107 F.R.D. at 393. Also, given the fact that the political question doctrine may have prohibited Larsen from asserting many of his claims against the Senate Defendants in state court, the court does not find his decision to file suit in federal court unreasonable or "motivated by any improper purpose." Id.

I. Senate Defendants' Motion to Strike Portions of the Amended Complaint

Pursuant to Federal Rule of Civil Procedure 12(f), the Senate Defendants argue that the court should dismiss paragraphs twenty-two, twenty- five, thirty-five, sixty, and sixty-one of the amended complaint. Rule 12(f) permits the

court to strike "any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). The paragraphs Defendants move to strike address the allegations made by Larsen in his petitions for disqualification and recusal regarding Justices Zappala and Cappy and Chief Justice Nix.

It is within the court's discretion to strike portions of the complaint which technically fall within the ambit of Rule 12(f). North Penn Transfer, Inc. v. Victaulic Co. of America, 859 F.Supp. 154, 158 (E.D.Pa.1994). "Motions to strike ... are not favored and usually will be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues." Id. (internal quotations omitted).

The allegations contained in the paragraphs which Defendants move to strike relate to Larsen's First Amendment claims against the Senate Defendants which the court has declined to dismiss. These portions of the amended complaint allege facts which address the nature and substance of Larsen's allegations regarding various justices of the Pennsylvania Supreme Court, thus supporting his claim that these statements are entitled to First Amendment protection. Furthermore, the facts alleged in these paragraphs are matters of public record. Accordingly, the court does not find that Defendants will be prejudiced by their inclusion in the amended complaint. The court will deny the motion to strike.

J. JCB Defendants' Motion for Sanctions

The JCB has moved for the imposition of sanctions pursuant to Rule 11 against Larsen and his counsel. The underlying premise upon which the JCB Defendants base their motion, is the frivolity of Larsen's claims against them. The court, however, will abstain from hearing these claims and

makes no finding as to the meritoriousness of Larsen's allegations against the JCB. As presented to the court, the JCB Defendants' motion would require the court to address the merits of Larsen's claims. Such an undertaking would be inappropriate in light of the court's decision to abstain. Moreover, the court does not find that its decision to abstain indicates such frivolity on Larsen's or his counsel's behalf in filing suit in federal court to warrant the imposition of sanctions in this case. The JCB Defendants are not prohibited from renewing their motion at a later stage in the proceeding.

IV. Conclusion

The court will enter an order in accordance with the foregoing discussion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROLF LARSEN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 95-CV-1540
	:	
SENATE OF COMMONWEALTH OF PENNSYLVANIA, et al.,	:	
	:	
Defendants.	:	

ORDER

In accordance with the accompanying memorandum of law, IT IS HEREBY ORDERED THAT:

(1) The motion to dismiss of the Senate of Pennsylvania is GRANTED.

(2) The motion to dismiss of the Supreme Court of Pennsylvania is GRANTED.

(3) The motion to dismiss of the Court of Judicial Discipline is GRANTED.

(4) All claims asserted against the Senate, Supreme Court and Court of Judicial Discipline in their personal capacities are DISMISSED.

(5) All claims against the individual Senate defendants in their personal capacities are DISMISSED.

(6) All claims against the individual members of the Court of Judicial Discipline in their official and personal capacities are DISMISSED.

(7) All claims against the individual members of the Judicial Conduct Board in their official capacities are DISMISSED.

(8) All claims asserted in parts II(a) and (b) of the complaint against the individual members of the Supreme Court in their official and personal capacities are DISMISSED.

(9) All claims asserted in paragraphs fifty-eight (58) (a), (b), (c), (e), (f), (g), (h), (i), (j), (k), (l), (m), (p), (q) and paragraph fifty-nine (59) against the Senate Defendants in their official capacities are DISMISSED. The claims asserted in paragraphs fifty-eight (58)(n) and (o) stand.

(10) Plaintiff's claims that he possessed a liberty interest in his job as a supreme court justice are DISMISSED.

(11) All claims asserted in paragraph fifty-five (55) are dismissed.

(12) All claims asserted in paragraph fifty-seven (57) are DISMISSED.

(13) The individual Senate Defendants motion to dismiss Plaintiff's claim that the Senate Defendants violated his First Amendment right in deciding to pursue impeachment proceedings against him contained in part I(b) of the complaint is GRANTED.

(14) The Senate Defendants' motion pursuant to Rule 41(b) is DENIED.

(15) The Senate Defendants' motion to strike portions of the complaint is DENIED.

(16) The Judicial Conduct Board Defendants' motion for sanctions is DENIED.

(17) Plaintiff's motion to strike portions of the Judicial Conduct 'Board Defendants brief and exhibits supporting their motion for sanctions is DENIED as moot.

(18) Plaintiff's request for oral argument is DENIED.

(19) All other relief otherwise requested by Defendants and not specifically referenced in this order is DENIED.

(20) Defendants shall respond to Plaintiff's motion for partial summary judgment within sixty days from the date of this order.

Dated: February 28, 1997.

/s/ SYLVIA H. RAMBO, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROLF LARSEN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 95-CV-1540
	:	
SENATE OF THE COMMONWEALTH OF PENNSYLVANIA, et al.,	:	(Chief Judge Rambo)
	:	
Defendants.	:	

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PART I(a) OF AMENDED COMPLAINT

Plaintiff Rolf Larsen hereby moves, pursuant to Rule 56, F.R.Civ.P., and Local Rule 7.4., for partial summary judgment against the Senate of the Commonwealth of Pennsylvania and individual senators, on his claim in Part I(a) of his amended complaint that the Senate and Senators violated his due process rights in convicting him on Article II of the Articles of Impeachment, by denying him justice and denying him the appearance of justice.

Plaintiff asks that the court determine that the Senate and individual senators are liable and that his conviction on Article II be overturned and that Article II be remanded to the Senate for proceedings consistent with due process. Plaintiff asks that issues as to other relief be reserved for trial.

In support of his motion, plaintiff relies on his accompanying statement of undisputed material facts, and declarations of plaintiff, of Cletus P. Lyman, Esquire, and of Phillip B. Perry, Esquire, brief and book of exhibits.

Dated: July 15, 1996.

/s/ Cletus P. Lyman

Cletus P. Lyman
Michael S. Fettner
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROLF LARSEN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 95-CV-1540
	:	
SENATE OF THE COMMONWEALTH OF PENNSYLVANIA, et al.,	:	
	:	
Defendants.	:	

PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS ON MOTION FOR PARTIAL SUMMARY JUDGMENT ON PART I(a) OF AMENDED COMPLAINT

Plaintiff Rolf Larsen hereby submits his statement of material facts as to which there is no genuine issue to be tried, pursuant to Rule 56, F.R.Civ.P., and Local Rule 7.4.

1. In November 1977, plaintiff was elected to a 10-year term as a justice on the Supreme Court of Pennsylvania. In November 1987, plaintiff won a retention election for a 10-year term beginning in January 1988.

2. As of October 4, 1994, plaintiff was in the seventh year of his term of office.

3. On June 6, 1994, the Senate received Articles of Impeachment against plaintiff from the House Managers, and passed a resolution, appointing an impeachment committee.

4. Sometime in June 1994, pursuant to Article X of the Rules of Practice and Procedure in the Senate when sitting on Impeachment Trials, Senator Robert C. Jubelirer, President Pro Tempore of the Senate, appointed to the Senate Impeachment Committee ("the Committee"), Senators Stewart J. Greenleaf, Charles D. Lemmond, Jr., H. Craig Lewis, Jeannette F. Reibman, Tim Shaffer and Hardy Williams.

5. On August 8, 1994, while the Senate was not in session, the Committee began evidentiary hearings on the Articles of Impeachment.

6. Evidentiary hearings were held on 17 separate days, on August 8-11, 15-19, 22, 24, 25, 29, 30, and September 7-9, 1994.

7. The evidentiary hearings were held before the six-senator committee and not before the full Senate.

8. On September 27, 1994, the full Senate heard closing arguments by the House Managers and Mr. Costopoulos.

9. Simultaneous with closing arguments on September 27, 1994, the Committee provided for the first time each senator with "Final Report of the Senate Impeachment Committee" ("Final Report").

10. On October 4, 1994, the full Senate convened to discuss and decide motions and to deliberate and vote on the Articles of Impeachment.

11. The motion of Senator Williams to establish the standard of proof of clear and convincing evidence was

denied by the full Senate.

12. The motion of Senator Williams to limit consideration to evidence adduced at the evidentiary hearings was denied by the full Senate by a vote of 48-1.

13. By a vote of 44 to 5, the Senate convicted plaintiff on Article II, but acquitted him on the other six Articles.

14. The Senate voted unanimously to bar plaintiff from holding any office of trust or profit in Pennsylvania.

15. Frequently, over the course of the 17 days of testimony, as witnesses were testifying at the evidentiary hearings, all of the Committee members, at one time or another, left the Senate chamber. Thus, no Committee member heard or saw all of the witnesses.

16. No non-committee senator heard or observed any witness testify in person.

17. After his conviction, plaintiff sought through counsel to learn how non-committee senators became acquainted with the evidence presented against him during the evidentiary hearings.

18. Plaintiff's counsel called the offices of 40 senators and wrote to 36 senators and one former senator.

19. Counsel got through to seven senators and two former senators and received two letters from Senator Clarence D. Bell.

20. Senators Albert V. Belan and Harold F.

Mowery and former Senators Michael E. Bortner and Bruce S. Marks admitted they did not read all the transcripts.

21. In his letter, Senator Bell said he could not recall how he became acquainted with the evidence.

22. By letter dated May 2, 1995, plaintiff's counsel Cletus P. Lyman, Esquire, wrote to 36 senators and one former senator, and inquired into the manner in which senators became acquainted with the evidence relevant to Article II, if at all.

23. Senator Bell was the only senator who responded to atty. Lyman's letter.

24. On June 26, 1995, counsel for senators wrote to atty. Lyman and said to direct to them all communications regarding the Larsen impeachment matter.

/s/ Cletus P. Lyman
Cletus P. Lyman
Michael S. Fettner
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040

Attorneys for Plaintiff

EXCERPTS FROM AMENDED COMPLAINT

IN THE UNITED STATES DISTRICT COURT -
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROLF LARSEN,	:
	:
Plaintiff,	:
	:
v.	: No. 95-1540
	:
SENATE OF THE COMMONWEALTH OF PENNSYLVANIA, et al.,	:
	:
	:Jury Trial
Defendants.	:Demanded

AMENDED COMPLAINT

Identity of the Parties

1. Plaintiff Rolf Larsen is an individual who resides in Allegheny County, Pennsylvania.

2. The Senate of the Commonwealth of Pennsylvania ("Senate") is an unincorporated association consisting of fifty members with offices in Harrisburg, Pennsylvania.

3. At all times relevant herein, the Senate consisted of Senators: ***

4. ***
5. ***
6. ***

7. ***
8. ***
9. ***
10. ***
11. ***
12. ***

13. All defendants are being sued in their official and personal capacities, and who acted under color of state law at all times relevant herein.

Jurisdiction

14. This court has jurisdiction under 28 U.S.C., Section 1331, providing jurisdiction over cases involving federal questions, and 28 U.S.C., Section 1343 and 42 U.S.C., Section 1983, providing jurisdiction over cases involving civil rights and violations of the Constitution of the United States.

Part I(a) - Larsen v. Senate and Senators

15. The Senate and all Senators above are made defendants herein.

16. Rolf Larsen served as a judge on the Court of Common Pleas of Allegheny County from 1974 to 1978, and as a Justice on the Supreme Court of Pennsylvania from 1978 to 1994. Justice Larsen was elected to the Supreme Court for a 10-year term, beginning in January 1978, and won a retention election for a 10-year term beginning in January 1988.

17. In about 1988, the Judicial Inquiry and Review Board ("JIRB") charged Justice Larsen with several

violations of Article V, Section 17(b), of the Pennsylvania Constitution, and the Code of Judicial Conduct, and began an investigation of the alleged violations.

18. On July 17, 1991, the JIRB issued "Report of the JIRB to the Supreme Court of Pennsylvania, Part II." The JIRB found Justice Larsen, acting without improper motive, had created an appearance of impropriety by meeting ex parte with a trial judge in a then-pending action in Allegheny County Court of Common Pleas. The JIRB recommended that Justice Larsen be publicly reprimanded.

19. On October 14, 1992, the Supreme Court of Pennsylvania, by Justices Zappala and Cappy, with Justice Papadakos dissenting, issued a per curiam order, without opinion, adopting the JIRB report and recommendation.

20. On November 24, 1992, Justice Larsen served his petition for disqualification and recusal of Justices Zappala and Cappy. Justice Larsen served supplemental and second supplemental petitions on December 14, 1992, and January 7, 1993, respectively.

21. The petitions for disqualification and recusal raised serious questions about the impartiality and motivation of Justice Zappala and Justice Cappy during the JIRB investigation of Justice Larsen and in deciding to reprimand Justice Larsen. The petitions asked Justices Zappala and Cappy to recuse themselves, or, in the alternative, that they be disqualified from considering the JIRB report and recommendation.

22. The petitions made general allegations as to the motivations of Justice Zappala and Justice Cappy, and specific allegations of acts of impropriety by them, as well

as impropriety by Chief Justice Nix in interfering in a pending trial in Lehigh County, Commonwealth v. David Lee Yohn, and in the Supreme Court's handling of Yohn's petition for allowance of appeal. Allegations included:

(a) a justice received kickbacks for directing bond work to an underwriting law firm;

(b) a justice met ex parte with litigants;

(c) justices rewarded an attorney for illegal assistance in offering free legal services;

(d) a justice granted favorable treatment to a litigant seeking reconsideration for illegal and extra-judicial reasons;

(e) Chief Justice Nix improperly interfered in the pending trial in Commonwealth v. David Lee Yohn, and that the Supreme Court improperly handled Yohn's petition for allowance of appeal over the course of three and one-half years, eventually denying Yohn's petition; and,

(f) that despite the obvious improper behavior of Chief Justice Nix, no investigation was undertaken or charges made against Chief Justice Nix.

23. On December 6, 1992, Justice Cappy wrote to Chief Justice Nix:

> "As a result of my vote to discipline Mr. Justice Larsen at No. 155, JIRB Docket 1992, he has made assertions against me in his Petition for Disqualification and Recusal which not only challenges my personal integrity, but also the

integrity of the Supreme Court of Pennsylvania.

"* * * However, since the integrity of the Court and its operating procedures have been placed in question in the minds of the public . . .

"As for me, I welcome enthusiastically the investure of such a panel, less so for the inevitable complete demudding of my name than for the just response it will give to Pennsylvania citizens' proper demand for accountability, fair play and truth-telling."

24. No later than December 20, 1992, as a result of the allegations of Justice Larsen in his petitions, former attorney general Ernie Preate, Jr., appointed two special counsels to investigate the allegations.

25. On December 31, 1992, the Philadelphia Inquirer published an article entitled "Sources say Justice Larsen could face more severe discipline - even removal." The article said:

"Pennsylvania Supreme Court Justice Rolf Larsen could be removed from the bench as a result of his own for review of a disciplinary case against him, according to sources close to the court.

"Removal would be the most dramatic of a range of possible consequences that could result from Larsen's request that the court reconsider its October decision to reprimand him. The court, by a 2-1 ruling on Oct. 14, found that Larsen had improperly communicated with a lower court judge about a pending case in 1986.

"In asking for a reconsideration last month, Larsen, who denies any misconduct, made sweeping accusations against the two justices who had voted to reprimand him, Stephen A. Zappala and Ralph J. Cappy.

"Those justices, according to knowledgeable sources, now are reviewing Larsen's request and re-examining the massive record of an investigation by the state Judicial inquiry and Review Board (JIRB) into Larsen's conduct, an inquiry that led to the reprimand vote.

"The sources, who would not agree to be named in print, said the review was being conducted on an accelerated, top-priority basis and could be completed within two or three weeks.

"One source said that Larsen's removal was a possibility but that the court could decide to take a lesser action, such as simply upholding the reprimand. The source stressed that no decision has been made.

"Two other sources said they believed removal was likely.

'That's definitely the way they're going,' said one; they may 'bounce him like a basketball.'

"The second source said that Larsen, in requesting reconsideration of the reprimand, had 'fashioned the club that beats him to death.'

* * *

"Long-simmering animosities among some of the seven Supreme Court justices have come to a head in the Larsen case."

26. As part of the investigation purportedly of Justice Larsen's allegations, the special counsels impanelled the Ninth Statewide Investigating Grand Jury, which heard testimony over a nine-month period in 1993, including testimony from Justice Larsen and Chief Justice Nix.

27. In January, 1993, Rep. Christopher K. McNally filed a Petition in the Pennsylvania House of Representatives ("House"), calling for Justice Larsen's impeachment, and accusing him of violations of the Code of Judicial Conduct.

28. The grand jury reported two areas of alleged misconduct by Justice Larsen: that he systematically maintained a list of petitions for allowance of appeal to be given special handling by his staff; and, that he regularly obtained prescription medications for his own use by causing a physician to issue prescriptions in the names of members of his staff.

29. On October 22, 1993, the grand jury issued Presentment No. 5 recommending that criminal charges be brought against Justice Larsen regarding the prescription drugs.

30. On October 25, 1993, G. Thomas Gates, supervising judge, issued an order accepting Presentment No.5.

31. On October 28, 1993, Justice Larsen was charged with criminal conspiracy and multiple violations of

the Controlled Substances Act. That same day, the Supreme Court relieved Justice Larsen from all judicial duties. However, Justice Larsen continued to receive his salary.

32. On November 5, 1993, grand jury report no. 1 was made public.

33. Grand jury report no. 1 became the basis for investigation of Justice Larsen by the Pa. House and the Judicial Conduct Board. The Pa. House Judiciary Committee requested, and apparently received from the Attorney General, copies of the testimony given (of approximately 220 witnesses) and exhibits presented, to the grand jury. This grand jury material was not then made available to Justice Larsen.

34. On November 23, 1993, the Pennsylvania House adopted House Resolution No. 205, session of 1993, authorizing its judiciary committee to investigate the conduct of Justice Larsen. After public hearings and investigation, the judiciary subcommittee on courts issued a report and recommendation.

35. On January 26, 1994, David Lee Yohn filed a writ of habeas corpus in federal court in Philadelphia.

36. On April 9, 1994, after a five day trial, Justice Larsen was convicted of two counts of criminal conspiracy under the Controlled Substances Act.

37. On April 22, 1994, the House subcommittee on courts voted to recommend to the entire House a resolution to impeach Justice Larsen.

38. On May 18, 1994, House Resolution 324 was

introduced, listing seven Articles of Impeachment against Justice Larsen.

39. On May 24, 1994, Resolution 324 was adopted by the House.

40. Article 5 alleged Justice Larsen's statements in his petitions were false and made in bad faith with a reckless disregard for the truth, and were made to obtain a reversal of his reprimand. The Senate later acquitted Justice Larsen of this Article.

41. On June 6, 1994, the Senate received the Articles of Impeachment from the House Managers, and passed a resolution, appointing an impeachment committee.

42. Pursuant to Article V of the Pennsylvania Constitution, no person shall be convicted without the concurrence of two-thirds of the members of the Senate present.

43. The Senate had on July 23, 1993, adopted Article X of the Rules of Practice and Procedure in the Senate when sitting on Impeachment Trials. The Rules set forth the procedure by which the Senate would conduct the Impeachment Trial of Justice Larsen.

44. Article X established the Senate Impeachment Committee ("the Committee"), a committee of six Senators, each of whom would be appointed by the President Pro Tempore, to conduct evidentiary hearings by examining documents and listening to live testimony.

45. Senator Robert C. Jubelirer, President Pro Tempore of the Senate, appointed Senators Stewart J.

Greenleaf, Charles D. Lemmond, Jr., H. Craig Lewis, Jeannette F. Reibman, Tim Shaffer and Hardy Williams, to the Committee.

46. On June 20, 1994, Justice Larsen filed an answer with new matter to the Articles of Impeachment.

47. On June 30, 1994, Justice Larsen filed an omnibus pretrial motion with the Senate, moving that the Senate dismiss this action for various reasons and, in addition, that the impeachment trial be held before the full Senate.

48. Justice Larsen's pretrial motion also contained a motion for a pretrial hearing before the full Senate, a motion for discovery, a motion for payment of attorney's fees and costs, a motion for recusal of certain Senators and a motion for continuance.

49. On August 8, 1994, while the full Senate was not in session, the Committee began evidentiary hearings on the impeachment of Justice Larsen and concluded the hearings on September 9, 1994.

50. On September 20, 1994, the full Senate heard arguments by counsel and without debate voted to deny all of plaintiff's pretrial motions.

51. On September 27, 1994, the full Senate convened and heard closing arguments by the House Managers and Justice Larsen's counsel. Simultaneously, the Committee provided for the first time each Senator with its Final Report of the Senate Impeachment Committee ("Final Report"), which provided a purported summary of evidence presented for the seven Articles of Impeachment. A copy

was given to counsel for plaintiff at the same time for the first time.

52. On October 4, 1994, the Senate voted on the seven Articles of Impeachment. Justice Larsen was convicted by a vote of 44 to 5 on Article II of the Articles of Impeachment. Justice Larsen was acquitted on the other six Articles. The Senate then voted unanimously to bar Justice Larsen from holding any office of trust or profit under the Commonwealth of Pennsylvania.

53. Article II alleged that in 1988 Justice Larsen had encouraged improper contact by Pittsburgh lawyer, Richard Gilardi, who asked Justice Larsen personally to review two petitions and then, at Justice Larsen's direction, gave him the cover sheets of the cases, writing "yes" on the petition he wanted granted and "no" on the petition he wanted denied.

54. Justice Larsen had property and liberty interests in his office as a Justice on the Supreme Court of Pennsylvania.

55. Justice Larsen had property and liberty interests in not being barred from holding office.

56. Justice Larsen's property and liberty interests were protected by the due process clause of the Fourteenth Amendment to the United States Constitution.

57. The proceedings by their nature were subject to guarantees of the Sixth Amendment to the United States Constitution, including an impartial fact-finder, confrontation with witnesses, and assistance of counsel.

58. The proceedings leading up to the conviction of Justice Larsen did not constitute a trial, and violated process due under the circumstances and in light of the interests involved, including process due under the Sixth Amendment, for each of the following reasons:

(a) Most members of the Senate, who were not members of the Committee, did not hear any evidence against Justice Larsen on Article II. Additionally, members of the Committee frequently absented themselves during the hearings.

(b) Decision on Article II, required those who voted, to weigh contradictory testimony of Justice Larsen and Mr. Gilardi. Justice Larsen testified, without qualification, that he was innocent of the charge in Article II. A former secretary to Justice Larsen, Barbara Roberts, testified in a manner inconsistent with the testimony of both Justice Larsen and Mr. Gilardi. Ms. Roberts was impeached by evidence that she was a disgruntled fired employee, and was romantically involved with Mr. Gilardi. The Final Report did not address the credibility of witnesses or make a recommendation.

(c) Given the nature of the charge, the remoteness in time of the events alleged, motivation of witnesses, and the sharply conflicting testimony, due process required members of the Senate to hear and observe the witnesses testify in person.

(d) The Committee and the Senate refused Justice Larsen's request that a standard of proof be established, and, in fact, a standard of proof was never established.

(e) The Committee and the Senate refused Justice

Larsen's request that they adopt rules of evidence for the hearings, and, in fact, rules of evidence were never adopted.

(f) Because of the simultaneous issuance of the Final Report and the closing arguments, Justice Larsen was not afforded the opportunity to review, address, rebut or clarify the Final Report. Justice Larsen was not given opportunity to testify or call witnesses in opposition to the Final Report.

(g) The Final Report was misleading and did not accurately or fully represent the facts produced at trial.

(h) During the evidentiary hearings and closing arguments, Justice Larsen was precluded from establishing that adverse witnesses had ex-parte communications with members of the Senate and members of the Committee.

(i) Justice Larsen was precluded from effectively cross-examining adverse witnesses.

(j) Senator Vincent Fumo, who voted to convict and otherwise participate in the proceedings as a Senator, also appeared as a witness in the proceedings.

(k) Another Senator who harbored ambitions of being a Pennsylvania Supreme Court Justice, served as a member of the Committee and voted to convict.

(l) Justice Larsen's pretrial motions were decided post-trial.

(m) Justice Larsen's request to continue the proceedings were denied because of a scheduled rush to judgment. Shortly before the hearings began, an avalanche

of material had been delivered to Justice Larsen's counsel, but because of the time limitations, they were never able to be reviewed.

(n) Justice Larsen was precluded from establishing the effect that Legislative Initiative Grants had on the proceedings, Senators and adverse witnesses. Such grants, known as "Walking Around Money," or "WAMS," are highly sought after discretionary funds awarded directly by individual Senators to whomever they want and are used by each party's leadership to maintain voting discipline among the other Senators.

(o) Justice Larsen was precluded from establishing that adverse witnesses, their agents, or relatives had made financial contributions to certain members of the Senate, including Senators who sat on the Committee.

(p) The Senate's finding of guilty as to Article II of the Articles of Impeachment is in direct conflict with the Senate's finding of acquittal as to Article III of the Articles of Impeachment. The Senate acquitted Justice Larsen (Article III) of testifying falsely when he testified, priorily, very specifically, in detail and without qualification, that the alleged events that Justice Larsen was alleged to have participated in, as set forth in Article II, did not occur.

(q) The Senate's finding of guilty as to Article II of the Articles of Impeachment is in direct conflict with the Senate's finding of acquittal as to Article VII and violates Article 6, Section 7 of the Pennsylvania Constitution.

(r) The Senate's finding of guilty as to Article II of the Articles of Impeachment was an influenced decision instead of a reasoned decision.

59. Justice Larsen was denied the appearance of justice in that he was not informed at any time how the members of the Senate, other than members of the Committee, became acquainted with the evidence (if they did). After his conviction, Justice Larsen, through counsel, asked members of the Senate voting for his conviction, other than members of the Committee, whether they read transcripts of witnesses relating to Article II or viewed their testimony on television. Members of the Senate have failed to say how they became acquainted with the evidence.

60. By memorandum and order dated May 5, 1995, the U.S. District Court for the Eastern District of Pennsylvania (Judge Clarence C. Newcomer) granted David Lee Yohn's writ of habeas corpus, and said that Chief Justice Nix's interference in the Yohn trial was "particularly egregious" and "nothing other than a gross abuse of the jurisdictional limits of his power." Judge Newcomer noted that the "Supreme Court's handling of the petition was, at the very least, unprincipled," and that "several holds were placed on the petition, in large part to avoid the embarrassment of airing the internal disputes of the Supreme Court publicly." Yohn v. Love, No. 94-524 (E.D.Pa. 5/5/95).

61. On February 9, 1996, the U.S. Court of Appeals for the Third Circuit affirmed the district court's order granting Yohn's writ of habeas corpus. Yohn v. Love, No. 95-1412 (3d Cir. 2/9/96).

Part I(b) - Larsen v. Senate and Senators

62. Paragraphs 1 - 61 above are incorporated herein by reference as if fully set forth at length.

63. The statements of Justice Larsen in his

petitions for disqualification and recusal were substantial or motivating factors in the decisions to proceed against him, and leading to the decisions to remove him from office and bar him from ever holding public office in Pennsylvania, and in the decisions themselves.

64. Justice Larsen's statements involve matters of public concern, in that they involve the conduct and integrity of the Supreme Court, and those charged with investigating the conduct of the Supreme Court.

65. Justice Larsen was injured in that he was removed from office and barred from ever holding public office in Pennsylvania.

66. Justice Larsen's statements in the petitions were protected by the speech and petition clauses of the First Amendment to the U.S. Constitution, and the decisions to remove him from office and bar him from ever holding public office in Pennsylvania, were in violation of the First Amendment.

* * *

WHEREFORE, plaintiff Rolf Larsen demands judgment in his favor as follows:

(1) against the Senate and Senators in their official capacities, granting declaratory and injunctive relief, voiding the Senate impeachment verdict of guilty on Article II;

(2) against the Senators in their personal capacities, awarding damages including loss of past and future wages and benefits, emotional harm, injury to reputation, and counsel fees;

* * *

(7) against all individual defendants in their personal capacities for punitive damages and such other relief as the court may find appropriate.

Plaintiff also demands attorneys fees and costs of litigation for this action against all defendants, pursuant to 42 U.S.C., Section 1988.

Dated: February 26, 1996.

/s/ Michael S. Fettner

Cletus P. Lyman
Michael S. Fettner
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040

Attorneys for Plaintiff

Supreme Court, U.S.
FILED
JAN 20 1999
CLERK

NO. 98-1038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROLF LARSEN,

Petitioner,

v.

ROY C. AFFLERBACH, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Arlin M. Adams*
Michael J. Barry

SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street
Suite 3600
Philadelphia, PA 19103
(215) 751-2000

Morey M Myers

MYERS, BRIER & KELLY LLP
108 N. Washington Ave.
Suite 700
Scranton, PA 18503
(717) 362-6100

* *Counsel of Record*

56pp

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether state Senators are entitled to legislative immunity when conducting impeachment proceedings pursuant to a constitutional mandate which makes the obligation to try all impeachments the sole province of the state Senate.

PARTIES TO THE PROCEEDING

Petitioner (plaintiff and appellee below):

ROLF LARSEN, a former member of the Supreme Court of Pennsylvania

Represented by:

Cletus Lyman and Michael Fettner
LYMAN & ASH
1612 Latimer Street
Philadelphia, Pennsylvania 19103
(215) 732-7040

Respondents (defendants and appellants below):

The present members of the Senate of the Commonwealth of Pennsylvania who are named as defendants in this action, and who are respondents to Larsen's petition, are as follows: GIBSON E. ARMSTRONG, ALBERT V. BELAN, CLARENCE D. BELL, LEONARD J. BODACK, DAVID J. BRIGHTBILL, VINCENT J. FUMO, STEWART J. GREENLEAF, MELISSA A. HART, EDWARD W. HELFRICK, EDWIN G. HOLL, ROBERT C. JUBELIRER, GERALD J. LAVALLE, CHARLES D. LEMMOND, JR., F. JOSEPH LOEPER, ROGER A. MADIGAN, ROBERT J. MELLOW, HAROLD F. MOWERY, JR., RAPHAEL J. MUSTO, MICHAEL A. O'PAKE, TERRY L. PUNT, JAMES J. RHOADES, ROBERT D. ROBBINS, FRANK A. SALVATORE, ALLYSON Y. SCHWARTZ, PATRICK J. STAPLETON, J. BARRY STOUT, RICHARD A. TILGHMAN, JACK WAGNER, and NOAH W. WENGER.

The former Senators who remain named as defendants, and who are respondents herein, are as follows: ROY C. AFFLERBACH, ANTHONY B. ANDREZESKI, EARL BAKER, MICHAEL E. BORTNER, J. DOYLE CORMAN,

MICHAEL M. DAWIDA, D. MICHAEL FISHER, DAVID W. HECKLER, ROXANNE H. JONES (deceased), H. CRAIG LEWIS, J. WILLIAM LINCOLN, BRUCE S. MARKS, FRANK A. PECORA, JOHN E. PETERSON, EUGENE E. PORTERFIELD, JEANETTE F. REIBMAN, TIM SHAFFER, JOHN J. SHUMAKER, WILLIAM J. STEWART and HARDY WILLIAMS.

Represented by:

Arlin M. Adams
Michael J. Barry

SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street
Suite 3600
Philadelphia, PA 19103
(215) 751-2000

Morey M. Myers

MYERS, BRIER & KELLY LLP
108 N. Washington Ave.
Suite 700
Scranton, PA 18503
(717) 362-6100

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

PRELIMINARY STATEMENT 1

COUNTER-STATEMENT OF THE CASE 1

A. Underlying Facts 2

B. Procedural History 3

REASONS FOR DENYING THE PETITION 7

I. There Are No Special Or Important Reasons For Granting The Petition For A Writ Of Certiorari. 7

II. The Question Of Larsen's Alleged "Property Interest" In Elected Office Under Pennsylvania Law Is Not Appropriate For Review By This Court. 12

CONCLUSION 15

APPENDIX

Amended Complaint in *Larsen v. Senate of the Commonwealth of Pennsylvania, et al.*, No. 95-CV-1540 (M.D. Pa.) A1

TABLE OF AUTHORITIES

CASES

Page

Acierno v. Cloutier, 40 F.3d 597 (3d Cir. 1994) 4

Board of Regents v. Roth, 408 U.S. 564 (1972) 13

Bogan v. Scott-Harris, 523 U.S. 44, 118 S. Ct. 966 (1998) 6, 7

Brown v. Griesenauer, 970 F.2d 431 (8th Cir. 1992) . 10, 11

Butler v. Pennsylvania, 51 U.S. 402 (1850) 13

Cohen v. Beneficial Industrial Loan Corp, 337 U.S. 541 (1972) 4

Davids v. Ackers, 549 F.2d 120 (9th Cir. 1977) 6

Doe v. McMillan, 412 U.S. 306 (1973) 8

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) 7, 8, 10

Hastings v. United States, 837 F. Supp. 3 (D.D.C. 1993); 9

Hastings v. United States Senate Impeachment Trial Com., 716 F. Supp. 38 (D.D.C.), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989) 9

In re 1991 Pennsylvania Legislative Reapportionment Commission, 609 A.2d 132 (Pa. 1992) 4, 13

In re Investigation by Dauphin County Grand Jury, 2 A.2d 802 (Pa. 1938) 5, 9, 10

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996) 12

Mecham v. Gordon, 751 P.2d 957 (Ariz. 1988) 9

Nixon v. United States, 506 U.S. 224 (1993) ... 2, 3, 5, 9, 11

Pulliam v. Allen, 466 U.S. 522 (1984) 11

Ritter v. United States, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1939) 9

Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980) 11

Spallone v. United States, 493 U.S. 265 (1990) 11

Tenney v. Brandhove, 341 U.S. 367, *reh'g denied*, 342 U.S. 843 (1951) 5, 6, 7, 8, 11

STATUTES

U.S. Const. Art. I, § 3, cl. 6 8

U.S. Const. Art. I, § 10 14

28 U.S.C. § 1292(b) 4

42 U.S.C. § 1983 ..... 5, 7, 10

Fed. R. App. P. 4

Pa. Const. Art. VI, § 5 ..... 2, 8

OTHER AUTHORITIES

Alexander Hamilton, The Federalist 8, 9

PRELIMINARY STATEMENT

Respondents, certain present and former members of the Senate of the Commonwealth of Pennsylvania, respectfully request this Court to deny the Petition for a Writ of Certiorari filed by Rolf Larsen. The holding of the Third Circuit that the Senators were entitled to legislative immunity from claims relating to their participation in an impeachment trial does not present an issue which merits consideration by this Court. The Court of Appeals's holding simply recognized the legislative and political roles that impeachment proceedings have traditionally played in our society, and does not create a split among the circuits warranting review.

COUNTER-STATEMENT OF THE CASE

Rolf Larsen ("Larsen") was a Justice on the Supreme Court of Pennsylvania until he was: (a) suspended from office by an order of the Supreme Court of Pennsylvania, based on allegations that he engaged in criminal activities; (b) removed from office based on a conviction on state drug charges; (c) removed from office by an order of the Pennsylvania Court of Judicial Discipline; and (d) convicted on articles of impeachment and barred from holding public office by the Pennsylvania Senate. Larsen's Petition before this Court involves his effort to overturn his conviction of impeachment by the Pennsylvania Senate.[1]

---

1. Larsen also sued the Supreme Court of Pennsylvania, the Administrative Office of Pennsylvania Courts, the Pennsylvania Court of Judicial Discipline, the Pennsylvania Judicial Conduct Board, and the individual members of those entities. Those claims are not relevant to Larsen's petition here. Larsen's petition is, however, related to another Petition for Writ of Certiorari currently pending before this Court. *Nix v. Larsen*, No. 98-988 (filed December 17, 1998). *Nix v. Larsen* involves Larsen's claims against certain present and former members of the Supreme Court of Pennsylvania and two employees of the Administrative

(continued...)

Larsen's Statement of the Case includes several factual allegations not contained in the record below. The district court decided this case in the context of a motion to dismiss, and, accordingly, only those facts alleged in Larsen's Amended Complaint are to be accepted as true. Larsen quoted excerpts of his Amended Complaint in the Appendix attached to his Petition. A complete copy of the Amended Complaint is attached hereto (A1-A28).

For purposes of addressing Larsen's petition, however, only a few undisputed facts are of relevance.

A. Underlying Facts

Larsen was elected to the Supreme Court of Pennsylvania in 1977, for a ten year term commencing January, 1978, and was reelected for a second ten year term beginning in January, 1988.

On May 24, 1994, the Pennsylvania House of Representatives adopted seven articles of impeachment against Larsen and presented them to the Pennsylvania Senate.

Article VI of the Pennsylvania Constitution requires that all articles of impeachment issued by the House be tried by the Pennsylvania Senate. On June 23, 1993, the Senate had adopted Article X of the Rules of Practice and Procedure in the Senate when sitting on Impeachment Trials. This Article, which contains procedures substantially identical to those adopted by the federal Congress, provided the framework by which the Pennsylvania Senate conducted Larsen's impeachment trial. Specifically, Article X delegated the responsibility of hearing live testimony to a committee of the Senate, which then was to issue a final report to the full Senate for consideration. *Compare Nixon v. United States*, 506 U.S.

1.(...continued)
Office of Pennsylvania Courts and the defense of qualified immunity.

224, 227-29 (1993) (explaining the rules adopted by Congress for the impeachment trial of Judge Nixon, including the referral to a Committee of the Senate).

On September 27, 1994, after a month of hearings, the Senate Impeachment Trial Committee submitted its final report to the full Senate, containing a summary of all of the evidence presented to the Committee. The full Senate then heard arguments from both sides of the impeachment proceeding.

On October 4, 1994, the Senate voted to convict Larsen on one article of impeachment, and to acquit him on the remaining six articles. The Senate then voted unanimously to bar Larsen from holding any office of trust or profit in Pennsylvania in the future.

B. Procedural History

On September 13, 1995, Larsen commenced this action against the Senate of the Commonwealth of Pennsylvania, and certain present and former members thereof (collectively, the "Senators").

In his Amended Complaint, Larsen alleged that the manner in which the Senate conducted his impeachment trial violated his rights under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment because, in his opinion, the Senate's procedures did not have all the elements of a judicial criminal prosecution. In addition, Larsen alleged that the impeachment conviction violated his rights under the First Amendment because, he speculated, the Senators who voted to convict him were motivated by a desire to retaliate against him for statements he had previously made accusing members of the Supreme Court of Pennsylvania of wrongdoing.

The Senators moved to dismiss Larsen's claims against them on the grounds that the claims were not justiciable; that they were barred by the Eleventh Amendment, legislative

immunity and qualified immunity; and that Larsen's Complaint failed to state a claim for which relief may be granted.

The district court held that Larsen's claims were justiciable, but that they were barred by the Eleventh Amendment and the doctrine of legislative immunity. Based on dictum from a previous opinion from the Court of Appeals for the Third Circuit[2], however, the district court held that legislative immunity did not bar Larsen's claims for prospective injunctive relief. Thus, under the district court's opinion, Larsen's substantive claims remained viable. Addressing the merits of Larsen's claims, the district court, *inter alia*, denied the Senators' motion to dismiss Larsen's Due Process claim, finding that Larsen had a "highly circumscribed" property interest in his elected office, despite the fact that the Pennsylvania Supreme Court had previously held that elected officials in Pennsylvania have no constitutionally protected interest in elected office. *In re 1991 Pennsylvania Legislative Reapportionment Commission*, 609 A.2d 132 (Pa. 1992). The district court did not address the Senators's claims of qualified immunity, implicitly denying that defense.

The district court certified the question of whether Larsen had a property interest in elected office for interlocutory appeal under 28 U.S.C. § 1292(b).

The Senators appealed the district court's improper limitation of legislative immunity to claims for monetary damages only, as well as the district court's implicit denial of their claims of qualified immunity, to the Court of Appeals for the Third Circuit under the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1972). In addition, the Third Circuit accepted jurisdiction over the certified question involving Larsen's alleged property interest in elected office under 28 U.S.C. § 1292(b) and Rule 5, F.R.A.P. The Senators also questioned the district court's

---

2. *Acierno v. Cloutier*, 40 F.3d 597, 608 n.8 (3d Cir. 1994)

determination that this case was justiciable and, as a matter of subject-matter jurisdiction, that issue was also properly before the Court of Appeals.

In an opinion dated August 11, 1998, the Court of Appeals affirmed the district court's holdings that Larsen's claims against the Senators were justiciable[3] and that legislative

---

3. Before addressing the merits of Larsen's Petition, it is important to note a preliminary question; namely, whether Larsen's challenge to the Senate's impeachment trial presents a justiciable issue.

In *Nixon v. United States*, 506 U.S. 224 (1993), this Court held that an impeachment proceeding is a uniquely legislative and political function which is not appropriate for judicial review, and rejected challenges to the federal impeachment process virtually identical to the claims asserted by Larsen here. *Id.* at 237-38. The same rationale adopted by this Court in *Nixon* applies with equal force to prohibit a federal court from questioning the manner in which a state legislature tries an impeachment, particularly where the procedures employed by the state is almost identical to those adopted by the federal government. Concerns of finality and a lack of judicially manageable standards counsel against judicial involvement in impeachment proceedings. *Id.* at 739.

Just as the federal courts may not review the conduct of Congress in conducting an impeachment proceeding, a state court may not review the conduct of a state legislature in conducting impeachment proceedings. *See In re Investigation by Dauphin County Grand Jury*, 2 A.2d 802, 803 (Pa. 1938). It would be anomalous to hold that Section 1983 makes an otherwise nonjusticiable question appropriate for review in federal courts. There is no authority for the proposition that either Section 1983 or the Due Process Clause of the Fourteenth Amendment was meant "to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here." *Tenney v. Brandhove*, 341 U.S. 367, 76 (1950), *reh'g denied*, 342 U.S. 843 (1951). Thus, the Court of Appeals's statement that "the Fourteenth Amendment and § 1983 were

(continued...)

immunity applied to impeachment proceedings. However, the Court of Appeals reversed the district court's limitation of the scope of protection afforded by legislative immunity to claims for monetary damages only, holding instead that legislative immunity bars claims for injunctive relief as well. Thus, the Third Circuit dismissed Larsen's claims against the Senators in their entirety. The Court of Appeals did not address the certified question of Larsen's alleged property interest in elected office under Pennsylvania law.

3.(...continued)
intended to radically alter the distribution of power between the Federal Government and the states," (Appendix to Larsen's Petition at A26), which is the basis for its ruling on justiciability, is not appropriate. As this Court stated in *Tenney*: "We cannot believe that Congress – itself a staunch advocate of legislative freedom – would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." 341 U.S. at 376.

The Court of Appeals rejected the Senators's argument on justiciability, focusing instead on the political question doctrine and its respect for coordinate branches of the federal government. We respectfully disagree with the Third Circuit's holding in this regard and submit that federal courts should decline to inject the federal judiciary into areas traditionally viewed as inherently political. *Davids v. Ackers*, 549 F.2d 120, 123 (9th Cir. 1977) (noting that, although the federal court technically had jurisdiction over the plaintiffs' challenges to the internal operations of the Arizona legislature, "[w]e have a strong feeling that if this court were to undertake to grant to plaintiffs the relief that they seek, our action would set the sometimes canonized and frequently capitalized Founding Fathers, as well as the Framers and Supporters of the Fourteenth Amendment, spinning in their graves.")

REASONS FOR DENYING THE PETITION

I. There Are No Special Or Important Reasons For Granting The Petition For A Writ Of Certiorari.

The holding of the Court of Appeals is straightforward and not controversial: Impeachment proceedings are, by definition, legislative activities. As set forth below, this has been well established since the founding of this nation, and has been recognized in numerous state and federal courts. Where the obligation for conducting impeachment trials is constitutionally assigned to the legislature, legislators' activities in those proceedings are protected by the doctrine of legislative immunity and may not be questioned in federal court.

In *Tenney v. Brandhove*, 341 U.S. 367, *reh'g denied*, 342 U.S. 843 (1951), this Court held that state legislators enjoy absolute legislative immunity for actions taken within the "sphere of legitimate legislative activity." 341 U.S. at 376. This protection is essentially the same as that afforded members of Congress under the Speech and Debate Clause of the United States Constitution. Last term, this Court reaffirmed the protection afforded by legislative immunity, holding that state, regional, and local legislators "are entitled to absolute immunity from liability under § 1983 for their legislative activities." *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966, 970 (1998).

Thus, in determining the applicability of legislative immunity, the relevant inquiry is whether the conduct in question is within the "legitimate legislative sphere." In *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), this Court held that actions are within the "legitimate legislative sphere" where they are constitutionally assigned to the legislature:

> In determining whether particular activities . . . fall within the 'legitimate legislative sphere' . . . we must determine whether the activities are 'an integral part of the deliberative and

> communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation *or with respect to other matters which the Constitution places within the jurisdiction of either House.*'"

Eastland, 421 U.S. at 503-04 (quoting *Doe v. McMillan*, 412 U.S. 306, 314 (1973)) (emphasis supplied). Likewise, in *Bogan*, the Court noted that legislative immunity is appropriate where the legislator acts "in a field where legislators traditionally have power to act." 118 S. Ct. at 973 (quoting *Tenney*, 341 U.S. at 379); *see also Tenney*, 341 U.S. at 378 ("To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive.")

Impeachment trials are an area in which legislators traditionally have had the power to act. The Pennsylvania Constitution, like the United States Constitution, places the right and obligation to conduct impeachment trials in the Senate. Pa. Const. Art. VI, § 5 ("All impeachments shall be tried by the Senate."); U.S. Const. Art. I, § 3, cl. 6 ("[The] Senate shall have the sole Power to try all Impeachments."). Because impeachment trials are the constitutional obligation of the Senate, such proceedings are within the "legitimate legislative sphere" and are protected by legislative immunity. *See* Alexander Hamilton, The Federalist, Nos. 65 and 66.

Larsen's argument that impeachment proceedings are judicial in nature ignores the role impeachment plays in our society and fails to appreciate that impeachments have traditionally been viewed as political and legislative functions. Courts across the nation have recognized that impeachments are an area in which the judiciary should stay its hand. "The Supreme Court has construed [the Speech and Debate] clause broadly; and this Court must accordingly protect the legitimate activities of Senators acting within their constitutionally

prescribed functions, *including legislation and impeachment.*" *Hastings v. United States Senate Impeachment Trial Com.*, 716 F. Supp. 38, 42 (D.D.C.), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989). "The Framers understood that impeachment trials were fundamentally political, which seems to indicate that impartiality – however much it has been present and is to be desired – is not guaranteed." *Id.* "[An impeachment] [t]rial in the Senate is a uniquely legislative and political function. It is not judicial." *Mecham v. Gordon*, 751 P.2d 957, 962 (Ariz. 1988). *See also Nixon v. United States*, 506 U.S. 224 (1993); *Hastings v. United States*, 837 F. Supp. 3 (D.D.C. 1993); *Ritter v. United States*, 84 Ct. C1. 293, 296 (1936), *cert. denied*, 300 U.S. 668 (1939); Alexander Hamilton, The Federalist No. 65. And, in Pennsylvania, the law is clear: "[T]he courts have *no jurisdiction* in impeachment proceedings, and *no control over their conduct*, so long as actions are taken within constitutional lines." *In re Investigation by Dauphin County Grand Jury*, 2 A.2d 802, 803 (Pa. 1938) (emphasis supplied).

In *Nixon v. United States*, this Court explained that "[t]he history and contemporary understanding of the impeachment provisions support our reading of the constitutional language [that the impeachment trials are within the sole province of the Senate]." 506 U.S. at 233. Indeed, the Court noted the absence of any authority to the contrary: "The parties do not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers." *Id.*

The Court of Appeals did no more than recognize the traditional role that impeachment plays in our government.

> Given that impeachments are matters 'which the Constitution places within the jurisdiction of either House,' and represent 'a field where legislators have traditionally had the power to act, we are convinced that when legislators play the role they have been given in impeachment

> proceedings, they act within the sphere of legitimate legislative activities and within their legislative capacities. Thus, the necessity for independence requires that legislators be accorded legislative immunity and 'not be questioned in any other place' concerning their activity and their decision.

Appendix to Larsen's Petition at A34 (citations omitted).

Contrary to Larsen's assertion, *Brown v. Griesenauer*, 970 F.2d 431 (8th Cir. 1992), does not create a split among the circuits which merits review by this Court. In *Brown*, a board of aldermen, acting pursuant to a Missouri statute, impeached a mayor of a small town. The impeached mayor sought review of his impeachment conviction before the Missouri state court, which granted the requested relief and vacated his impeachment conviction. Thereafter, the mayor commenced an action in federal court under Section 1983, seeking monetary damages from the board members who voted to convict him. The Court of Appeals for the Eighth Circuit held that the board members were immune from liability for monetary damages and dismissed the case.

Brown is distinguishable from the present case for at least two reasons. First, *Brown* involved a board of aldermen acting pursuant to a *statutory* grant of authority in conducting impeachment proceedings against a local mayor – not the legislative arm of a state conducting impeachment proceedings pursuant to a constitutional mandate. The fact that the Senate here was acting pursuant to a constitutional grant of authority is dispositive. *See Eastland*, 421 U.S. at 504; *see also In re Investigation by Dauphin County Grand Jury*, 2 A.2d at 803.

Second, a careful reading of the *Brown* opinion demonstrates that the Eighth Circuit's discussion of the characteristics of legislative and judicial immunity was dicta, because the resolution of that case did not turn on which

immunity doctrine applied.[4] In *Brown*, the plaintiff sought only money damages, *and did not seek injunctive relief.* 970 F.2d at 434 n.2. Both legislative and judicial immunity bar claims for money damages. *Tenney*, 341 U.S. at 379 (legislative immunity); *Pulliam v. Allen*, 466 U.S. 522 (1984) (judicial immunity). Only legislative immunity, however, also bars injunctive relief. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 732-33 (1980); *Spallone v. United States*, 493 U.S. 265, 278 (1990). Because application of either legislative or judicial immunity would have supported the court's decision in *Brown*, the distinction between the two doctrines was not before the court. Only when a plaintiff seeks injunctive relief, as Larsen did here, is the scope of legislative immunity truly at issue.

This Court has recognized: "Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counter-intuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers." *Nixon*, 506 U.S. at 235. Although the Court in *Nixon* was interpreting the federal Constitution, the same rationale applies here: Impeachment trials are an inherently legislative and political function not appropriate for judicial review.

The Third Circuit's holding that impeachment trials are within the "sphere of legitimate legislative activity" is consistent with this Court's rulings in *Tenney*, *Eastland*, and *Bogan*. Accordingly, Larsen's petition for a writ of certiorari should be denied.

---

4. The defendants in *Brown* relied primarily on an assertion of judicial immunity, and argued for legislative immunity in the alternative. 970 F.2d at 434.

II. The Question Of Larsen's Alleged "Property Interest" In Elected Office Under Pennsylvania Law Is Not Appropriate For Review By This Court.

Larsen's second "question presented," involving his alleged property interest in elected office under Pennsylvania law, was not considered by the Court of Appeals and need not be addressed by this Court.

The Third Circuit observed: "Because the immunity issue disposes of the entirety of Larsen's allegations against the Senators, we need not address the issue of whether Larsen possessed a constitutionally protected property interest in his elected position." Appendix to Larsen's Petition at A40. Likewise, this Court need not address the issue of whether Pennsylvania law provides for a property right in elected office unless the Court determines that legislative immunity does not apply to impeachment proceedings -- a result which, we submit, would be in error. Even in the unlikely event that the Court decides that legislative immunity was improper, the Court should remand this case to the Court of Appeals for initial consideration of the certified question. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) ("[W]e generally do not address arguments that were not the basis for the decision below.").

In any event, however, consideration of Larsen's second "question presented" would not prove fruitful because the law is clear that Larsen had no constitutionally protected interest in his elected office of Justice of the Supreme Court of Pennsylvania.[5]

---

5. It is questionable whether Larsen may properly ask this Court to review the extent of his alleged property right in elected office. The district court *denied* the Senators's motion to dismiss Larsen's due process claim which had argued that Larsen did not have a property right. The *Senators* moved the district court to certify for interlocutory appeal

(continued...)

In his petition, Larsen avoids a critical issue: Property rights are determined by state law. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). In arguing that the Court should consider the question (certified by the Senators), Larsen relies exclusively on *federal* law for the proposition that "[u]nder the Fourteenth Amendment, a state employee has a property interest in his position when he has a legitimate claim of entitlement to continued employment." Petition at 19. But, before the Fourteenth Amendment is implicated, state law must recognize a property interest that warrants protection. *Roth*, 408 U.S. at 569.

In *In re 1991 Pennsylvania Legislative Reapportionment Commission*, 609 A.2d 132 (Pa. 1992), the Pennsylvania Supreme Court squarely held that public officials have no constitutionally protected interest in elected office: "Thus, as we have held in the past, *elected officials' interest in their offices does not merit constitutional protection.*" *Id.* at 140-41 (emphasis supplied). Therefore, whatever "interest" a public official may have in elected office, according to the Pennsylvania Supreme Court, that interest simply does not constitute a property right. *See also Butler v. Pennsylvania*, 51 U.S. 402, 417 (1850) ("We have already shown, that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error [the impairment of contracts

---

5.(...continued)
the issue of Larsen's alleged property right in elected office. Although the Third Circuit granted the Senators's petition for permission to file an interlocutory appeal regarding the property right issue, the court never addressed the issue, instead concluding that the district court should not have considered Larsen's claims at all because the Senators enjoied legislative immunity.

clause, Art. I § 10[6]; do not come within the import of the term *contracts*, or, in other words, the vested, private personal rights thereby intended to be protected" (emphasis in original).).

Thus, under Pennsylvania law, it is clear that Larsen did not have any property interest in the elected office of Justice of the Pennsylvania Supreme Court. It is also clear, therefore, that the district court erred in finding that Larsen had some sort of "highly circumscribed" property right. Nevertheless, this Court need not address whether public officials have a property interest in elected office under Pennsylvania law. The Senators were the parties who originally sought review of this question before the Third Circuit, and such review was rendered unnecessary when the Court of Appeals dismissed Larsen's claims on the grounds of legislative immunity.

Because legislative immunity bars Larsen's claims against the Senators, and because the Third Circuit did not address whether Larsen had a property interest under Pennsylvania law in his office as Justice of the Pennsylvania Supreme Court, Larsen's petition for a writ of certiorari on the property interest question should be denied.

---

6. The Fourteenth Amendment was not adopted until 1868, eighteen years after the Court's decision in *Butler*.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should deny Rolf Larsen's Petition for a Writ of Certiorari.

Respectfully submitted,

Arlin M. Adams*
Michael J. Barry

SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street
Suite 3600
Philadelphia, PA 19103
(215) 751-2000

Morey M. Myers

MYERS, BRIER & KELLY LLP
108 N. Washington Ave.
Suite 700
Scranton, PA 18503
(717) 362-6100

* *Counsel of Record*

APPENDIX

APPENDIX
TABLE OF CONTENTS

Amended Complaint in *Larsen v. Senate of the Commonwealth of Pennsylvania, et al.*, No. 95-CV-1540 (M.D. Pa..) A1

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

ROLF LARSEN, Plaintiff

v.

SENATE OF THE COMMONWEALTH OF
PENNSYLVANIA, et al., Defendants

NO. 9S-CV-1540

AMENDED COMPLAINT

Identity of the Parties

1. Plaintiff Rolf Larsen is an individual who resides in Allegheny County, Pennsylvania.

2. The Senate of the Commonwealth of Pennsylvania ("Senate") is an unincorporated association consisting of fifty members with offices in Harrisburg, Pennsylvania.

3. At all times relevant herein, the Senate Consisted of Senators: Roy C. Afflerbach, Anthony B. Andrezeski, Gibson E. Armstrong, Earl Baker, Albert V. Belan, Clarence D. Bell, Leonard J. Bodack, Michael E. Bortner, David J. Brightbill, J. Doyle Corman, Michael M. Dawida, Michael B. Fisher, Vincent J. Fumo, Stewart J. Greenleaf, Melissa A. Hart, David W. Heckler, Edward W. Helfrick, Edwin G. Holl, Roxanne H. Jones, Robert C. Jubelirer, Gerald J. Lavalle, Charles D. Lemmond, Jr., H. Craig Lewis, J. William Lincoln, F. Joseph Loeper, Roger A.

Madigan, Bruce S. Marks, Robert J. Mellow, Harold F. Mowery, Jr., Raphael J. Musto, Michael A. O'Pake, Frank A. Pecora, John E. Peterson, Eugene E. Porterfield, Terry L. Punt, Jeanette F. Reibman, James J. Rhoades, Robert D. Robbins, Frank A. Salvatore, Allyson Y. Schwartz, Tim Shaffer, John J. Shumaker, Patrick J. Stapleton, William J. Stewart, J. Barry Stout, Richard A. Tilghman, Jack Wagner, Noah W. Wenger, and Hardy Williams.

4. The Supreme Court of Pennsylvania is the highest appellate court in the Commonwealth of Pennsylvania and has a location in (Middle District) Harrisburg, Pennsylvania.

5. The Supreme Court of Pennsylvania consisted of Justices Robert Nix, John Flaherty, Stephen Zappala, Nicholas Papadakos, Ralph Cappy, Frank Montemuro, and Ronald Castille, at all times relevant herein.

6. The Court of Judicial Discipline ("CJD") is an eight member unincorporated State Administrative tribunal that sits and maintains offices in Harrisburg, Pennsylvania.

7. Joseph F. McCloskey, William F. Burns, Dawson R. Muth, Peter DePaul, Carol K. McGinley, Christine L. Donohue, Justin M. Johnson and William Cassenbaum were members of the Court of Judicial Discipline at all times relevant herein.

8. The Judicial Conduct Board ("JCB") is a twelve member unincorporated State Board which maintains its offices in Harrisburg, Pennsylvania,,whose function is to submit petitions, etc., to the CJD in order to activate the CJD.

9. Joseph A. Del Sole, Gerard P. Egan, Arthur J. Edmunds, Diane M. Edmundson, John W. Herron, Frederick Wells Hill, Esquire, Sister Matthew Anita MacDonald, Gerald J. O'Connor, Andrew Palm, Charles W. Rubendall, II, James E. Russo, Bernard C. Watson, were members of the JCB at all times relevant herein, and William J. Arbuckle, III, Bruce A. Antkowiak, and Thomas A. Bergstrom were employees of the JCB at all times relevant herein.

10. Defendant Administrative office of Pennsylvania Courts is an unincorporated body whose function is to assist in administering the Pennsylvania Court system, and which maintains offices in Mechanicsburg, Pennsylvania.

11. Nancy M. Sobolevitch was the Court Administrator of Pennsylvania at all times relevant herein with an address at Mechanicsburg, Pennsylvania.

12. David A. Frankforter was the Manager of Human Resources of the Court Administrator of Pennsylvania at all times relevant herein, with an address at Mechanicsburg, Pennsylvania.

13. All defendants are being sued in their official and personal capacities, and who acted under color of state law at all times relevant herein.

Jurisdiction

14. This court has jurisdiction under 28 U.S.C., Section 1331, providing jurisdiction over cases involving federal questions, and 28 U.S.C., Section 1343 and 42 U.S.C., Section 1983, providing jurisdiction over cases

involving civil rights and violations of the Constitution of the United States.

Part I(a) - Larsen v. Senate and Senators

15. The Senate and all Senators above are made defendants herein.

16. Rolf Larsen served as a judge on the Court of Common Pleas of Allegheny County from 1974 to 1978, and as a Justice on the Supreme Court of Pennsylvania from 1978 to 1994. Justice Larsen was elected to the Supreme Court for a 10-year term, beginning in January 1978, and won a retention election for a 10year term beginning in January 1988.

17. In about 1988, the Judicial Inquiry and Review Board ("JIRB") charged Justice Larsen with several violations of Article V, Section 17(b), of the Pennsylvania Constitution, and the Code of Judicial Conduct, and began an investigation of the alleged violations.

18. On July 17, 1991, the JIRB issued "Report of the JIRB to the Supreme Court of Pennsylvania, Part II." The JIRB found Justice Larsen, acting without improper motive, had created an appearance of impropriety by meeting ex parte with a trial judge in a then-pending action in Allegheny County Court of Common Pleas. The JIRB recommended that Justice Larsen be publicly reprimanded.

19. On October 14, 1992, the Supreme Court of Pennsylvania, by Justices Zappala and Cappy, with Justice Papadakos dissenting, issued a per curium order, without opinion, adopting the JIRB report and recommendation.

20. On November 24, 1992, Justice Larsen served his petition for disqualification and recusal of Justices Zappala and Cappy. Justice Larsen served supplemental and second supplemental petitions on December 1.4, 1992, and January 7, 1993, respectively.

21. The petitions for disqualification and recusal raised serious questions about the impartiality and motivation of Justice Zappala and Justice Cappy during the JIRB investigation of Justice Larsen and in deciding to reprimand Justice Larsen. The petitions asked Justices Zappala and Cappy to recuse themselves, or, in the alternative, that they be disqualified from considering the JIRB report and recommendation.

22. The petitions made general allegations as to the motivations of Justice Zappala and Justice Cappy, and specific allegations of acts of impropriety by them, as well as impropriety by Chief Justice Nix in interfering in a pending trial in Lehigh County, Commonwealth v. David Lee Yohn, and in the Supreme Court's handling of Yohn's petition for allowance of appeal. Allegations included:

a. justice received kickbacks for directing bond work to an underwriting law firm;

b. a justice met ex parte with litigants;

c. justices rewarded an attorney for illegal assistance in offering free legal services;

d. a justice granted favorable treatment to a litigant seeking reconsideration for illegal and extra-judicial reasons;

e. Chief Justice Nix improperly interfered in the pending trial in Commonwealth v. David Lee Yohn, and that the Supreme Court improperly handled Yohn's petition for allowance of appeal over the course of three and one-half years, eventually denying Yohn's petition; and,

f. that despite the obvious improper behavior of Chief Justice Nix, no investigation was undertaken or charges made against Chief Justice Nix.

23. On December 6, 1992, Justice Cappy wrote to Chief Justice Nix:

> "As a result of my vote to discipline Mr. Justice Larsen at No. 155. JIRB Docket 1992, he has made assertions against me in his Petition for Disqualification and Recusal which not only challenges my personal integrity, but also the integrity of the Supreme Court of Pennsylvania.
>
> "* * * However, since the integrity of the Court and its operating procedures have been placed in question in the minds of the public . . .

> "As for me, I welcome enthusiastically the investure of such a panel, less so for the inevitable complete demudding of my name than for the just response it will give to Pennsylvania citizens, proper demand for accountability, fair play and truth-telling."

24. No later than December 20, 1992, as a result of the allegations of Justice Larsen in his petitions, former attorney general Ernie Preate, Jr., appointed two special counsels to investigate the allegations.

25. On December 31, 1992, the Philadelphia Inquirer published an article entitled "Sources say Justice Larsen could face more severe discipline - even removal." The article said:

> "Pennsylvania Supreme Court Justice Rolf Larsen could be removed from the bench as a result of his own for review of a disciplinary case against him, according to sources close to the court.
>
> "Removal would be the most dramatic of a range of possible consequences that could result from Larsen's request that the court reconsider its October decision to reprimand him. The court, by a 2-1 ruling on Oct. 14, found that Larsen had improperly communicated with a lower court judge about a pending case in 1986.
>
> "In asking for a reconsideration last month, Larsen, who denies any misconduct, made

sweeping accusations against the two justices who had voted to reprimand him, Stephen A. Zappala and Ralph J. Cappy.

"Those justices, according to knowledgeable sources, now are reviewing Larsen's request and re-examining the massive record of an investigation by the state Judicial inquiry and Review Board (JIRB) into Larsen's conduct, an inquiry that led to the reprimand vote.

"The sources, who would not agree to be named in print, said the review was being conducted on an accelerated, top priority basis and could be completed within two or three weeks.

"One source said that Larsen's removal was a possibility but that the court could decide to take a lesser action, such as simply upholding the reprimand. The source stressed that no decision has been made.

"Two other sources said they believed removal was likely. 'That's definitely the way they're going,' said one; they may 'bounce him like a basketball.'

"The second source said that Larsen, in requesting reconsideration of the reprimand, had 'fashioned the club that beats him to death.'

* * * *

"Long-simmering animosities among some of the seven Supreme Court justices have come to a head in the Larsen case."

26. As part of the investigation purportedly of Justice Larsen's allegations, the special counsels impaneled the Ninth Statewide Investigating Grand Jury, which heard testimony over a nine-month period in 1993, including testimony from Justice Larsen and Chief Justice Nix.

27. In January, 1993, Rep. Christopher K. McNally filed a Petition in the Pennsylvania House of Representatives ("House"), calling for Justice Larsen's impeachment, and accusing him of violations of the Code of Judicial Conduct.

28. The grand jury reported two areas of alleged misconduct by Justice Larsen: that he systematically maintained a list of petitions for allowance of appeal to be given special handling by his staff; and, that he regularly obtained prescription medications for his own use by causing a physician to issue prescriptions in the names of members of his staff.

29. On October 22, 1993, the grand jury issued Presentment No. 5 recommending that criminal charges be brought against Justice Larsen regarding the prescription drugs.

30. On October 25, 1993, G. Thomas Gates, supervising judge, issued an order accepting Presentment No. 5.

31. On October 28, 1993, Justice Larsen was charged with criminal conspiracy and multiple violations of the Controlled Substances Act. That same day, the Supreme Court relieved Justice Larsen from all judicial duties. However, Justice Larsen continued to receive his salary.

32. On November 5, 1993, grand jury report no. 1 was made public.

33. Grand jury report no. 1 became the basis for investigation of Justice Larsen by the Pa. House and the Judicial Conduct Board. The Pa. House Judiciary Committee requested, and apparently received from the Attorney General, copies of the testimony given (of approximately 220 witnesses) and exhibits presented, to the grand jury. This grand jury material was not then made available to Justice Larsen.

34. On November 23, 1993, the Pennsylvania House adopted House Resolution No. 205, session of 1993, authorizing its judiciary committee to investigate the conduct of Justice Larsen. After public hearings and investigation, the judiciary subcommittee on courts issued a report and recommendation.

35. On January 26, 1994, David Lee Yohn filed a writ of habeas corpus in federal court in Philadelphia.

36. On April 9, 1994, after a five day trial, Justice Larsen was convicted of two counts of criminal conspiracy under the Controlled Substances Act.

37. On April 22, 1994, the House subcommittee on courts voted to recommend to the entire House a resolution, to impeach Justice Larsen.

38. On May 18, 1994, House Resolution 324 was introduced, listing seven Articles of Impeachment against Justice Larsen.

39. On May 24, 1994, Resolution 324 was adopted by the House.

40. Article 5 alleged Justice Larsen's statements in his petitions were false and made in bad faith with a reckless disregard for the truth, and were made to obtain a reversal of his reprimand. The Senate later acquitted Justice Larsen of this Article.

41. On June 6, 1994, the Senate received the Articles of Impeachment from the House Managers, and passed a resolution, appointing an impeachment committee.

42. Pursuant to Article V of the Pennsylvania Constitution, no person shall be convicted without the concurrence of two thirds of the members of the Senate present.

43. The Senate had on July 23, 1993, adopted Article X of the Rules of Practice and Procedure in the Senate when sitting on Impeachment Trials. The Rules set forth the procedure by which the Senate would conduct the Impeachment Trial of Justice Larsen.

44. Article X established the Senate Impeachment Committee ("the Committee"), a committee of six Senators,

each of whom would be appointed by the President Pro Tempore, to conduct evidentiary hearings by examining documents and listening to live testimony.

45. Senator Robert C. Jubelirer, President Pro Tempore of the Senate, appointed Senators Stewart J. Greenleaf, Charles D. Lemmond, Jr., H. Craig Lewis, Jeannette F. Reibman, Tim Shaffer and Hardy Williams, to the Committee.

46. On June 20, 1994, Justice Larsen filed an answer with new matter to the Articles of Impeachment.

47. On June 30, 1994, Justice Larsen filed an omnibus pretrial motion with the Senate, moving that the Senate dismiss this action for various reasons and, in addition, that the impeachment trial be held before the full Senate.

48. Justice Larsen's pretrial motion also contained a motion for a pretrial hearing before the full Senate, a motion for discovery, a motion for payment of attorney's fees and costs, a motion for recusal of certain Senators and a motion for continuance.

49. On August 8, 1994, while the full Senate was not in session, the Committee began evidentiary hearings on the impeachment of Justice Larsen and concluded the hearings on September 9, 1994.

50. On September 20, 1994, the full Senate heard arguments by counsel and without debate voted to deny all of plaintiff's pretrial motions.

51. On September 27, 1994, the full Senate convened and heard closing arguments by the House Managers and Justice Larsen's counsel. Simultaneously, the Committee provided for the first time each Senator with its Final Report of the Senate Impeachment Committee ("Final Report"), which provided a purported summary of evidence presented for the seven Articles of Impeachment. A copy was given to counsel for plaintiff at the same time for the first time.

52. On October 4, 1994, the Senate voted on the seven Articles of Impeachment. Justice Larsen was convicted by a vote of 44 to 5 on Article II of the Articles of Impeachment. Justice Larsen was acquitted on the other six Articles. The Senate then voted unanimously to bar Justice Larsen from holding any office of trust or profit under the Commonwealth of Pennsylvania.

53. Article II alleged that in 1988 Justice Larsen had encouraged improper contact by Pittsburgh lawyer, Richard Gilardi, who asked Justice Larsen personally to review two petitions and then, at Justice Larsen's direction, gave him the cover sheets of the cases, writing "yes" on the petition he wanted granted and "no" on the petition he wanted denied.

54. Justice Larsen had property and liberty interests in his office as a Justice on the Supreme Court of Pennsylvania.

55. Justice Larsen had property and liberty interests in not being barred from holding office.

56. Justice Larsen's property and liberty interests were protected by the due process clause of the Fourteenth Amendment to the United States Constitution.

57. The proceedings by their nature were subject to guarantees of the Sixth Amendment to the United States Constitution, including an impartial fact-finder, confrontation with witnesses, and assistance of counsel.

58. The proceedings leading up to the conviction of Justice Larsen did not constitute a trial, and violated process due under the circumstances and in light of the interests involved, including process due under the Sixth Amendment, for each of the following reasons:

a. Most members of the Senate, who were not members of the Committee. did not hear any evidence against Justice Larsen on Article II. Additionally, members of the Committee frequently absented themselves during the hearings.

b. Decision on Article II, required those who voted, to weigh contradictory testimony of Justice Larsen and Mr. Gilardi. Justice Larsen testified, without qualification, that he was innocent of the charge in Article II. A former secretary to Justice Larsen, Barbara Roberts, testified in a manner inconsistent with the testimony of both Justice Larsen and Mr. Gilardi. Ms. Roberts was impeached by evidence that she was a disgruntled fired employee, and was romantically involved with Mr. Gilardi. The Final Report did not address

the credibility of witnesses or make a recommendation.

c. Given the nature of the charge, the remoteness in time of the events alleged, motivation of witnesses, and the sharply conflicting testimony, due process required members of the Senate to hear and observe the witnesses testify in person.

d. The Committee and the Senate refused Justice Larsen's request that a standard of proof be established, and, in fact, a standard of proof was never established.

e. The Committee and the Senate refused Justice Larsen's request that they adopt rules of evidence for the hearings, and, in fact, rules of evidence were never adopted.

f. Because of the simultaneous issuance of the Final Report and the closing arguments, Justice Larsen was not afforded the opportunity to review, address, rebut or clarify the Final Report. Justice Larsen was not given opportunity to testify or call witnesses in opposition to the Final Report.

g. The Final Report was misleading and did not accurately or fully represent the facts produced at trial.

h. During the evidentiary hearings and closing arguments, Justice Larsen was precluded from

establishing that adverse witnesses had ex-parte communications with members of the Senate and members of the Committee.

i. Justice Larsen was precluded from effectively cross-examining adverse witnesses.

j. Senator Vincent Fumo, who voted to convict and otherwise participate in the proceedings as a Senator, also appeared as a witness in the proceedings.

k. Another Senator who harbored ambitions of being a Pennsylvania Supreme Court Justice, served as a member of the Committee and voted to convict.

l. Justice Larsen's pretrial motions were decided post-trial.

m. Justice Larsen's request to continue the proceedings were denied because of a scheduled rush to judgment. Shortly before the hearings began, an avalanche of material had been delivered to Justice Larsen's counsel, but because of the time limitations, they were never able to be reviewed.

n. Justice Larsen was precluded from establishing the effect that Legislative Initiative Grants had on the proceedings, Senators and adverse witnesses. Such grants, known as "Walking Around Money," or "WAMS," are highly sought after

discretionary funds awarded directly by individual Senators to whomever they want and are used by each party's leadership to maintain voting discipline among the other Senators.

o. Justice Larsen was precluded from establishing that adverse witnesses, their agents, or relatives had made financial contributions to certain members of the Senate, including Senators who sat on the Committee.

p. The Senate's finding of guilty as to Article II of the Articles of Impeachment is in direct conflict with the Senate's finding of acquittal as to Article III of the Articles of Impeachment. The Senate acquitted Justice Larsen (Article III) of testifying falsely when he testified, priority, very specifically, in detail and without qualification, that the alleged events that Justice Larsen was alleged to have participated in, as set forth in Article II, did not occur.

q. The Senate's finding of guilty as to Article II of the Articles of Impeachment is in direct conflict with the Senate's finding of acquittal as to Article VII and violates Article 6, Section 7 of the Pennsylvania Constitution.

r. The Senate's finding of guilty as to Article II of the Articles of Impeachment was an

influenced decision instead of a reasoned decision.

59. Justice Larsen was denied the appearance of justice in that he was not informed at any time how the members of the Senate, other than members of the Committee, became acquainted with the evidence (if they did). After his conviction, Justice Larsen, through counsel, asked members of the Senate voting for his conviction, other than members of the Committee, whether they read transcripts of witnesses relating to Article II or viewed their testimony on television. members of the Senate have failed to say how they became acquainted with the evidence.

60. By memorandum and order dated May 5, 1995, the U.S. District Court for the Eastern District of Pennsylvania (Judge Clarence C. Newcomer) granted David Lee Yohn's writ of habeas corpus, and said that Chief Justice Nix's interference in the Yohn trial was "particularly egregious" and "nothing other than a gross abuse of the jurisdictional limits of his power." Judge Newcomer noted that the "Supreme Court's handling of the petition was, at the very least, unprincipled," and that "several holds were placed on the-petition, in large part to avoid the embarrassment of airing the internal disputes of the Supreme Court publicly." Yohn v. Love, No. 94-524 (E.D. Pa. 5/5/95).

61. On February 9, 1996, the U.S. Court of Appeals for the Third Circuit affirmed the district court's order granting Yohn's writ of habeas corpus. Yohn v. Love, No. 95-1412 (3d Cir, 2/10/96).

Part I(b) Larsen v. Senate and Senators

62. Paragraphs 1 - 61 above are incorporated herein by reference as if fully set forth at length.

63. The statements of Justice Larsen in his petitions for disqualification and recusal were substantial or motivating factors in the decisions to proceed against him, and leading to the decisions to remove him from office and bar him from ever holding public office in Pennsylvania, and in the decisions themselves.

64. Justice Larsen's statements involve matters of public concern, in that they involve the conduct and integrity of the Supreme Court, and those charged with investigating the conduct of the Supreme court.

65. Justice Larsen was injured in that he was removed from office and barred from ever holding public office in Pennsylvania.

66. Justice Larsen's statements in the petitions were protected by the speech and petition clauses of the First Amendment to the U.S. Constitution, and the decisions to remove him from office and bar him from ever holding public office in Pennsylvania, were in violation of the First Amendment.

Part II(a) - Larsen v.. Supreme Court of Pennsylvania,
Court of Judicial Discipline,
and Judicial Conduct Board, et. al.

67. The Supreme Court of Pennsylvania, Robert Nix, John Flaherty, Stephen Zappala, Nicholas Papadakos,

Ralph Cappy, and Frank Montemuro are made Defendants herein.

68. The CJD, Joseph F. McCloskey, William F. Burns, Dawson R. Muth, Peter DePaul, Carol K. McGinley, Christine L. Donahue, and Justin M. Johnson are made defendants herein.

69. The JCB, Joseph A. Del Sole, Gerard P. Egan, Arthur J. Edmunds, Ms. Diane M. Edmundson, John W. Herron, Frederick wells Hill, Matthew Anita MacDonald, Gerald J. O'Connor, Andrew Palm, Charles W. Rubendall, II, James E. Russo, Bernard C. Watson, William J. Arbuckle, III, Bruce A. Antkowiak, and Thomas A. Bergstrom are made defendants herein.

70. On May 18, 1993, the electorate in the Commonwealth of Pennsylvania adopted an amendment ("1993 Amendment") to Article V of the Pennsylvania Constitution, changing the judicial discipline system.

71. The 1993 Amendment established a two-tiered system of judicial discipline. Under the new system, the JCB investigates allegations of misconduct and may file formal complaints with the CJD. The CJD then decides the merits of the case and, in appropriate cases, enters an order of discipline. Appeals from decisions of the CJD are to the Supreme Court of Pennsylvania, unless the respondent judicial officer is a Justice of the Supreme Court,.in which case a Special Tribunal of seven judges of the Superior and Commonwealth Courts, who are not members of the JCB or the CJD, hear the appeal.

72. Part of the 1993 Amendment, Article V, Section(d)(2) says that "... the [CJD] may issue an interim order directing the suspension, with or without pay, of any justice, Judge, or justice of the peace against whom formal charges have been filed with the [CJD] by the [JCB] or against who has been filed an indictment or information charging a felony".

73. Article V, Section 18(a)(5), says that "the [JCB] shall prescribe general rules governing the conduct of members." Pursuant thereto in 1993, the JCB adopted the Interim Rules of Procedure Governing the Judicial Conduct Board ("Interim Rules"). These rules specifically omitted "felony indictment or information" as a basis for interim suspension.

74. Rule 10 of the Interim Rules limits (and attempts to extend) the JCB's power, authority and jurisdiction to seek an interim order of suspension to only two situations: one, if the "continued service of the judicial officer is causing or may cause immediate and substantial public harm;" two, if "the continued service of the judicial officer may erode public confidence in the orderly administration of justice."

75. On October 28, 1993,. the Attorney General of Pennsylvania, then Ernie Preate, Jr., announced that he was charging Justice Larsen with certain violations of the law involving his obtaining of his prescribed drugs for the treatment of chronic depression and anxiety. On the same day the Supreme Court of Pennsylvania entered an order relieving Justice Larsen of all of his judicial and administrative responsibilities and duties as a Supreme Court Justice.

76. On January 7, 1994, Pennsylvania, by its Attorney General, filed an information in the Court of Common Pleas of Allegheny County, charging Justice Larsen with 28 certain felonies, including the placing of prescription medications meant to be used by Justice Larsen in the names of others in order to protect his privacy.

77. In January 1994, the JCB wrote to Justice Larsen that it was instituting an investigation into all his activities.

78. On March 10, 1994, the JCB notified Justice Larsen to continue the investigation, pursuant to "J.C.B.I.R.P. 7(A)(4)."

79. On March 10, 1994, the JCB filed an application with the CJD for an interim order directing the suspension of Justice Larsen with pay, on the basis that Justice Larsen had been charged with a felony, and said that if Justice Larsen was found guilty of a felony charge then the JCB's requested suspension with pay be automatically converted to a suspension without pay.

80. On or about March 20, 1994, Justice Larsen filed an answer and new matter to the JCB's application. on March 25, 1994, the CJD issued an order denying the application.

81. On April 18, 1994, the JCB again filed an application with the CJD for an interim order directing the suspension of Justice Larsen without pay (the "Application") based this time on the fact of a jury in the Allegheny County Court of Common Pleas finding Justice Larsen guilty of two

of the aforementioned charges (conspiracy). Sentencing had not occurred. The convictions are presently on appeal.

82. The JCB lacked the power and jurisdiction to file the Application with the CJD because neither one of the abovementioned criteria was applicable. Justice Larsen had already been relieved from his judicial duties by the October 1993, order of the Supreme Court. It was impossible for him to harm the public or erode the confidence in the orderly administration of justice, and these two criteria were not set forth in the application for suspension.

83. Rule 10 of the Interim Rules says that the JCB may move for the suspension of a judicial officer, "If, when it authorizes the filing of formal charges, the JCB believes that ..." one of the above-mentioned criteria is met.

84. The JCB had not filed any formal charges against Justice Larsen. Therefore, pursuant to the JCB's Interim Rules, the JCB lacked the authority/power/jurisdiction to file the application for an order of suspension with or without pay.

85. On May 5, 1994, Justice Larsen filed his answer and new matter to the JCBIs application.

86. On May 16, 1994, the JCB filed a response to new matter.

87. On May 25, 1994, a hearing was held before the CJD. Exhibits showing the criminal information and jury verdicts were admitted into evidence.

88. Counsel for Justice Larsen moved that the hearing be bifurcated to allow the introduction of testimony at a later date. The CJD denied the motion.

89. On June 3, 1994, the CJD granted the application for an interim order directing the suspension of Justice Larsen without pay.

90. On June 6, 1994, the JCB filed with the CJD, "Board Complaint - Formal Charges" against Justice Larsen, alleging, among other things, matters alleged in his petitions for disqualification and recusal of Justice Zappala and Justice Cappy.

91. Article V, Section 18(b)(3), of the Pennsylvania Constitution, says that "the [CJD] shall proscribe general rules governing the conduct of members." Section 18(b)(4) says, "The [CJD] shall adopt rules to govern the conduct of the proceedings before the [CJD]. The CJD adopted such rules. Rule 2, "Scope of Rules," says, "These rules shall govern the conduct of all proceedings before the Court of Judicial Discipline."

92. The CJD did not adopt any rules for interim orders of suspension with or without pay; thus the CJD did not have the authority or jurisdiction to issue an interim order suspending Justice Larsen without pay. Additionally, the linchpin words of the suspension are"the words of the Constitution of Pennsylvania, i.e., "an indictment or information charging a felony," Article V, Section(d)(2). Nowhere is the word "conviction" used. When the CJD entered its order of March 25, 1994, denying suspension of Justice Larsen that adjudicated the matter and became the law of the case -- nothing constitutionally had intervened to give

any vitality to its June 3, 1994, suspension order. Additionally, the CJD reaffirmed its June 3, 1994, order of suspension by an order dated January 24, 1995.

93. When the CJD issued the interim suspension order without pay, it violated its own rules and acted beyond its Pennsylvania constitutional powers.

94. Pursuant to Article V, Section 18(d)(3), interim orders of suspension, with or without pay, are nonappealable. Therefore, no appeal process was available to Justice Larsen.

95. Additionally, the CJD and its members and the JCB and its members and employees have acted illegally and without jurisdiction in a manner harmful to Justice Larsen by wrongfully asserting by petitions, briefs, hearing dates and orders that they have jurisdiction over Justice Larsen's right to practice law in the Commonwealth of Pennsylvania.

96. On August 25, 1993, a per curium order was issued by the Supreme Court of Pennsylvania, by Chief Justice Nix and Justices John Flaherty, Stephen Zappala, Nicholas Papadakos, Ralph Cappy, and Frank Montemuro, with Justice Larsen dissenting, appointing Joseph F. McCloskey, Carol K. McGinley, Peter DePaul and Dawson R. Muth to the CJD and appointing Joseph A. Del Sole, Frederick wells Hill, Gerald J. O'Connor, Andrew Palm, James E. Russo and Bernard C. Watson, to the JCB.

97. The appointments to the JCB and the CJD were done in an improper manner to deny Justice Larsen due

process of law and equal protection of the law in the within proceedings.

98. Some members of the JCB and the CJD were appointed to serve because they had close ties to members of the Supreme Court, with the result that Justice Larsen was denied due process of law and equal protection of the law.

99. The actions and proceedings above, including the decisions to appoint members to the JCB and CJD who had close ties to Supreme Court members, to lodge improper charges against Justice Larsen, to issue an interim order suspending him without pay, and to take action with respect to his right to practice law, were in violation of the due process and equal protection clauses of the Fourteenth Amendment to United States Constitution.

Part II(b) - Larsen v. Supreme Court of Pennsylvania, Court of Judicial Discipline, and Judicial Conduct Board, et. al.

100. Paragraphs 1 - 99 above are incorporated by reference herein as if fully set forth at length.

101. The statements of Justice Larsen in his petitions for disqualification and recusal were substantial or motivating factors in the decisions to appoint members to the JCB and CJD who had close ties to Supreme Court members. to lodge improper charges against Justice Larsen, to issue an interim order suspending him without pay, and to take action with respect to his right to practice law.

102. Justice Larsen's statements involve matters of public concern, in that they involve the conduct and integrity

of the Supreme Court, and those charged with investigating the conduct of the Supreme Court.

103. Justice Larsen was injured in that he was suspended without pay and improper action was taken against him with respect to his right to practice law.

104. Justice Larsen's statements in the petitions were protected by the speech and petition clauses of the First Amendment to the U.S. Constitution, and the decisions to appoint members to the JCB and CJD who had close ties to Supreme Court members, to lodge improper charges against Justice Larsen, to issue an interim order suspending him without pay, and to take action with respect to his right to practice law, were in violation of the First Amendment.

Part III(a) - Larsen v. Supreme Court of Pennsylvania, and Administrative Office of Pennsylvania Courts, et al.

105. The Supreme Court of Pennsylvania, Robert Nix, John Flaherty, Stephen Zappala, Nicholas Papadakos, Ralph Cappy, Frank Montemuro and Ronald Castille are made defendants herein.

106. Administrative office of Pennsylvania Courts, Nancy M. Sobolevitch and David A. Frankfort er are made defendants herein.

107. In January 1974, when Justice Larsen became a member of the Pennsylvania judiciary, one of the terms and conditions of his service was a medical plan that provided lifetime medical benefits for members of the judiciary with 20 or more years of service, regardless of age.

108. On or about December 12, 1989, the Pennsylvania Supreme Court adopted a new medical insurance plan for retired members of the state judiciary.

109. The new plan provides lifetime benefits for members of the judiciary with 10 or more years of service, regardless of age.

110. Benefits under the new plan include "Fully State-Paid Basic & Specialized Coverage." "Basic" coverage includes hospital and medical expenses, etc. "Specialized" coverage includes dental, vision, hearing and prescription drug expenses.

111. As of December 12, 1989, Justice Larsen had served as a member of the judiciary for over 10 years. As a result, Justice Larsen's benefits vested as of December 12, 1989, and he was entitled to "Fully State-Paid Basic & Specialized Coverage" for life upon separation from the judiciary.

112. As of January 1994, Justice Larsen had served as a member of the judiciary for 20 years.

113. On or about June 17, 1994, defendant Frankforter, on behalf of the above defendants, informed Justice Larsen that he would no longer receive "Fully State-Paid Basic & Specialized Coverage" as of the close of business on June 3, 1994, on the purported basis of an amendment to Article V, Section 16, of the Pennsylvania Constitution, effective August 18, 1993.

114. The constitutional amendment above had no effect on Justice Larsen's entitlement to "Fully State-Paid

Basic & Specialized Coverage which vested as of December 12, 1989.

115. Defendants violated the equal protection clause of the Fourteenth Amendment by denying Justice Larsen "Fully State-Paid Basic & Specialized Coverage," to which he was entitled for his lifetime. other members of the judiciary, who qualified for lifetime benefits and were later removed from office under similar circumstances, continue to receive state-paid medical benefits, whereas Justice Larsen does not.

116. Defendants violated the impairment of contracts clause of the U.S. Constitution by denying Justice Larsen continued "Fully State-Paid Basic & Specialized Coverage," to which he was entitled, in applying the amendment to Article V, Section 16, of the Pennsylvania Constitution, effective August 18, 1993, retroactively to Justice Larsen, whereas his lifetime entitlement to "Fully State-Paid Basic & Specialized Coverage," had become vested as of December 12, 1989.

117. Defendants violated the due process clause by arbitrarily denying Justice Larsen "Fully State-Paid Basic & Specialized Coverage," to which he was entitled.

118. Justice Larsen was offered the opportunity to establish a direct-pay medical insurance policy as a participant in the community-based medical insurance program which Blue Cross/Blue Shield offered.

119. Justice Larsen's payments under this option were much higher than if he was participating in the Commonwealth's group plan and his benefits were

significantly lower. A direct-pay plan did not exist for specialized coverage, therefore, he was unable to obtain dental, vision, hearing and prescription drug insurance other than on a individual basis.

120. As a result of defendants' wrongful denial of Justice Larsen's medical benefits, he has incurred many thousands of dollars in medical expenses he would not have incurred if he had remained covered under "Fully State-Paid Basic & Specialized Coverage."

Part III(b) - Larsen v. Supreme Court of Pennsylvania, and Administrative Office of Pennsylvania Courts, et al.

121. Paragraphs 105 - 120 above are incorporated by reference herein as if fully set forth at length.

122. 42 U.S.C., Section 300bb-1, et. seq., provides that state and local government group health plans must provide continuation coverage to certain individuals such as Justice Larsen. Coverage must consist of coverage which, as of the time the coverage is being provided, is identical to the coverage provided under the plan to similarly situated beneficiaries with respect to whom a qualifying event has not occurred. Such coverage shall be for 18 months. Justice Larsen was also denied this coverage by defendants.

123. No qualifying event occurred within the meaning of 42 U.S.C., Section 300bb-1.

124. Defendants' wrongful denial of Justice Larsen's medical benefits constitutes a violation of 42 U.S.C., Section 300bb-1, et. seq., in that he was not afforded identical coverage.

125. As a result of defendants' wrongful denial of Justice Larsen's medical benefits, he has incurred many thousands of dollars in medical expenses he would not have incurred if he had remained covered under "Fully State-Paid Basic & Specialized Coverage."

Part III© - Larsen v. Supreme Court of Pennsylvania, and Administrative Office of Pennsylvania Courts, et al.

126. Paragraphs 1 - 125 above are incorporated by reference herein as if fully set forth at length.

127. The statements of Justice Larsen in his petitions for disqualification and recusal were substantial or motivating factors in the decisions to deny him "Fully State-Paid Basic & Specialized Coverage" for his lifetime under the medical plan, and to deny him such coverage for at least 18 months under PHSA.

128. Justice Larsen's statements involve matters oil public concern, in that they involve the conduct and integrity of the Supreme Court, and those charged with investigating the conduct of the Supreme Court.

129. Justice Larsen was injured in that he was denied medical benefits to which he was entitled, and he incurred thousands of dollars in medical expenses.

130. Justice Larsen's statements in the petitions were protected by the speech and petition clauses of the First Amendment to the U.S. Constitution, and the decisions to deny him "Fully State-Paid Basic & Specialized Coverage" for his lifetime under the medical plan, and to deny him such

coverage for at least 18 months under PHSA, were in violation of the First Amendment.

WHEREFORE, plaintiff Rolf Larsen demands judgment in his favor as follows:

(1) against the Senate and Senators in their official capacities, granting declaratory and injunctive relief, voiding the Senate impeachment verdict of guilty on Article !I;

(2) against the Senators in their personal capacities, awarding damages including loss of past and future wages and benefits, emotional harm, injury to reputation, and counsel fees;

(3) against the Supreme Court, Court of Judicial Discipline, Judicial Conduct Board, and all individual members, in their official capacities, granting declaratory and injunctive relief: (i) voiding the Court of Judicial Discipline's order dated June 3, 1994, of suspension without pay; (ii) voiding the appointments to the Judicial Conduct Board and the Court of Judicial Discipline; and, (iii) voiding the action of interfering with Plaintiff's right to practice law;

(4) against the Supreme Court, Court of Judicial Discipline, Judicial Conduct Board, and all individual members, in their personal capacities, awarding damages, including loss of past and future wages and benefits, emotional harm, injury to reputation, and counsel fees;

(5) against the Supreme Court and individual justices and Administrative Office and individual members in their official capacities, granting declaratory and injunctive relief, voiding the action of terminating plaintiff's health and medical benefits;

(6) against the Supreme Court and individual justices and Administrative office and individual members in their personal capacities, awarding damages for medical expenses incurred by plaintiff from June 4, 1994, to date; and,

(7) against all individual defendants in their personal capacities for punitive damages and such other relief as the court may find appropriate.

Plaintiff also demands attorneys fees and costs of litigation for this action against all defendants, pursuant to 42 U.S.C., Section 1988.

Dated: February 26, 1996.

/s/ Michael S. Fettner

Cletus P. Lyman
Michael S. Fettner
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040

Attorneys for Plaintiff

Supreme Court, U.S.
FILED
FEB 9 1999
CLERK

No. 98-1038

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

ROLF LARSEN,

Petitioner,

v.

ROY C. AFFLERBACH, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI

Cletus P. Lyman*
Michael S. Fettner
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040

* *Counsel of Record*

1498

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Corrections to Respondents' Facts 1

Statement of Additional Facts 2

Reasons for granting the Writ 4

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Boddie v. Connecticut, 401 U.S. 371 (1971) . . . 10

Bogan v. Scott-Harris,
523 U.S. 44, 118 S.Ct 966 (1998) 5,6

Brown v. Griesenauer,
970 F.2d 431 (8th Cir. 1992) 4,5

Davis v. Passman, 422 U.S. 228 (1979) 7

Eastland v. U.S. Servicemen's Fund,
421 U.S. 491 (1975) 6

Forrester v. White, 484 U.S. 219 (1988) 6

Goldberg v. Kelly, 397 U.S. 254 (1970) 10

Gravel v. U.S., 408 U.S. 606 (1972) 6

Guarino v. Larsen,
821 F.Supp. 1040 (E.D.Pa. 1992) 10

Humphreys v. D.E.A.,
96 F.3d 658 (3d Cir. 1996) 2

In re Franciscus,
471 Pa. 53, 369 A.2d 1190 (1977) 8,9

In re Investigation by Dauphin County Grand Jury (No. 2),
332 Pa. 342, 2 A.2d 802 (1938) 7

In re 1991 Pa. Leg. Reapp. Comm.,
530 Pa. 335, 609 A.2d 132 (1992) 10

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 6

Larsen v. Senate,
166 Pa.Cmwlth. 472, 646 A.2d 694 (1994) . . . 8

Marshall Impeachment Case,
363 Pa. 326, 69 A.2d 619 (1949) 8

Matters of Judges Glancey and Chiovero,
515 Pa. 201, 527 A.2d 997 (1987) 8,9

Spallone v. U.S., 493 U.S. 265 (1990) 6

Sweeney v. Tucker,
473 Pa. 493, 375 A.2d 698 (1977) 10

Tenney v. Brandhove, 341 U.S. 367 (1951) . . . 6,7

U.S. v. Johnson, 383 U.S. 169 (1966) 6

Webster v. Doe, 486 U.S. 592 (1988) 7

U.S. Constitution and Statute:

Article I, § 6, clause 1 7

Fourteenth Amendment 7

42 U.S.C. § 1983 7

Other Authorities:

Black's Law Dictionary (5th Ed. 1979) 5

Pa. Legislative Journal--Senate, 1779 8

Pa. Legislative Journal--Senate,
February 27, 1794 8

Pa. Legislative Journal--Senate,
January 13, 1803 8

Proceedings of the Constitutional Convention
of 1776 8

Proceedings of the Council of Censors, 1784 . . . 8

CORRECTIONS TO RESPONDENTS' COUNTER STATEMENT OF THE CASE

Respondents' counter-statement of the case (p. 1) is inaccurate. In November 1977, petitioner was elected to a 10-year term as a justice on the Supreme Court of Pennsylvania, and in November 1987, he won a retention election for an additional 10-year term beginning in January 1988.[1]

Respondents mislead by repeatedly referring to petitioner's "conviction on state drug charges," falsely implying that he was involved with illegal drugs. This is an improper attempt to place petitioner in a bad light. Although irrelevant to this proceeding because petitioner was acquitted by the Senate on the article relating to controlled substances, he wishes to set forth this matter accurately.

On October 28, 1993, Mr. Larsen was charged with criminal conspiracy and 28 other violations of the Pa. Controlled Substances Act, alleging he had obtained medically needed prescription tranquilizers for his own use, whereby his personal physician issued prescriptions in the names of other persons, with their consent, to protect his privacy. That same day, the Supreme Court relieved him from all judicial duties, in effect suspending him, but he continued to receive his full salary and all health and medical benefits.[2]

---

[1]Petitioner was not "re-elected," as respondents say (p.2), he won a "retention election," pursuant to Pa. Const., Art. V, § 15(b). In a retention election, the electorate votes yes or no to retain a judge. The judge does not run against an opponent, as in a House or Senate race.

[2]The October 23, 1993, order did not say anything about "criminal charges," contrary to respondents' assertion (p. 1).

On March 10, 1994, the PA Judicial Conduct Board ("JCB") filed an application with the PA Court of Judicial Discipline ("CJD") for an interim order requesting the suspension of Mr. Larsen without pay. On March 25, 1994, the Court of Judicial Discipline denied the application.

On April 9, 1994, following trial in the Court of Common Pleas, Allegheny County, PA, Mr. Larsen was convicted of two counts of criminal conspiracy with his doctor, Earl A. Humphreys, M.D., the unindicted co-conspirator, to issue medically needed tranquilizers in the names of third parties, with their consent, so as to protect his privacy. Privacy was medically necessary for successful treatment. Mr. Larsen was acquitted of all other charges. DEA revoked the certificate of Dr. Humphreys to write prescriptions for controlled substances, but this decision was remanded for a new hearing directing that the issue of patient privacy be taken into account. *Humphreys v. D.E.A.*, 96 F.3d 658 (3d Cir. 1996).[3] Dr. Humphreys has since died.

On June 3, 1994, upon the application of the JCB, the CJD issued an order directing the suspension of Mr. Larsen without pay. One-half of the members of the JCB and CJD are appointed by the Supreme Court of Pennsylvania.[4]

On June 13, 1994, in the criminal action, Mr. Larsen was sentenced to probation, community service, removal from

---

[3]Paradoxically, the Allegheny County judge who presided over Mr. Larsen's criminal trial, W. Terrance O'Brien, did not permit Mr. Larsen to introduce evidence of privacy to show, among other things, lack of criminal intent. Appeal is pending.

[4]The CJD did not remove petitioner from office, contrary to respondents' assertion (p. 1).

office,[5] and payment of costs. On August 5, 1996, the Superior Court of Pennsylvania vacated sentence and remanded for sentencing based on only one conspiracy count, not two. In May 1997, Judge O'Brien imposed the same sentence as he imposed on June 13, 1994. Appeal is pending.

STATEMENT OF ADDITIONAL FACTS

Petitioner alleges serious Fourteenth Amendment Due Process defects in the impeachment proceedings leading to his removal from office and bar from ever holding office of profit or trust in Pennsylvania. The amended complaint, ¶ 58(a)-(r) [petition appendix A146-A148], sets forth many such defects, among others:

> "(a) Most members of the Senate, who were not members of the Committee, did not hear any evidence against Justice Larsen on Article II. Additionally, members of the Committee frequently absented themselves during the hearings."
>
> "(d) The Committee and the Senate refused Justice Larsen's request that a standard of proof be established, and, in fact, a standard of proof was never established."
>
> "(e) The Committee and the Senate refused Justice Larsen's request that they adopt rules of evidence for the hearings, and, in fact, rules of evidence were never adopted."
>
> "(f) Because of the simultaneous issuance of the Final Report and the closing arguments, Justice Larsen was not

---

[5]A public official convicted of an "infamous" crime may be removed from office. The criminal trial judge "deemed" petitioner's criminal conspiracy to be an "infamous" crime.

afforded the opportunity to review, address, rebut or clarify the Final Report. Justice Larsen was not given opportunity to testify or call witnesses in opposition to the Final Report."

"(g) The Final Report was misleading and did not accurately or fully represent the facts produced at trial."

"(h) During the evidentiary hearings and closing arguments, Justice Larsen was precluded from establishing that adverse witnesses had ex-parte communications with members of the Senate and members of the Committee."

"(i) Justice Larsen was precluded from effectively cross-examining adverse witnesses."

"(n) Justice Larsen was precluded from establishing the effect that Legislative Initiative Grants had on the proceedings, Senators and adverse witnesses. Such grants, known as "Walking Around Money," or "WAMS," are highly sought after discretionary funds awarded directly by individual Senators to whomever they want and are used by each party's leadership to maintain voting discipline among the other Senators."

"(o) Justice Larsen was precluded from establishing that adverse witnesses, their agents, or relatives had made financial contributions to certain members of the Senate, including Senators who sat on the Committee."

REASONS FOR GRANTING THE WRIT

Legislative immunity

Respondents try to distinguish *Brown v. Griesenauer*, 970

F.2d 431 (8th Cir. 1992), by asserting that impeachment proceedings authorized by state statute are different from those authorized by state constitution, and that the *Brown* analysis of legislative and judicial function was dicta.

Brown explicitly rejected this argument, and held that the basis in state law of impeachment authority was not determinative of the nature of impeachment. Whether authority to conduct impeachment proceedings is delegated to a legislative body, by constitution or statute, impeachment proceedings are not legislative acts, but are acts that happen to be done by legislators. The source of authority, like the branch of government authorized, does not determine the nature of any immunity. Respondents offer no authority or analysis that the source of impeachment authority is relevant to determining the nature of official immunity.

Brown's analysis of whether aldermen were entitled to legislative or judicial immunity is not dicta. *Black's Law Dictionary* (5th Ed. 1979), defines *obiter dictum* as "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand."

The issue was clearly raised on appeal and *Brown* squarely decided, that the aldermen, sitting as a board of impeachment as to the mayor, were acting in a judicial rather than legislative capacity, which determination was "essential to determination of the case," and thus was not *obiter dictum*.

The Third Circuit's decision not to follow *Brown* on the ground that municipal legislators are distinct from state legislators for immunity purposes [A35] is contrary to *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S.Ct 966, 971 (1998).

"The rationales for according absolute immunity to

federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability."

Bogan said "absolute legislative immunity attaches to all actions taken in the sphere of legislative activity," citing *Tenney v. Brandhove*, 341 U.S. 367 (1951), and "whether an act is legislative turns on the nature of the act." In *Bogan*, a mayor was granted legislative immunity when participating in the legislative process (i.e., preparing a budget for submission to city council). *Tenney* held that California state senators were entitled to legislative immunity.[6]

This court should accept this case to resolve the confusion and conflict over the scope of legislative immunity between a "label" approach, followed in this case by the Third Circuit, and the "functional" approach, applied in *Bogan* and *Brown*, and well described in *Forrester v. White*, 484 U.S. 219, 224 (1988), whereby the immunity afforded is based on the "nature of the functions with which a particular official or class of officials has been lawfully entrusted."

The federal source of legislative immunity is the Speech or Debate Clause, U.S. Const., Art I, § 6. This court has made "clear" that the central role of the Speech or Debate Clause is to prevent intimidation of legislators by the executive and accountability before a possibly hostile judiciary. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975), citing *U.S. v. Johnson*, 383 U.S. 169, 181

---

[6]This "same doctrine of legislative immunity" was applied to regional legislators in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404-405 (1979). *See, Spallone v. U.S.*, 493 U.S. 265, 279 (1990)(local legislators).

(1966), and *Gravel v. U.S.*, 408 U.S. 606, 617 (1972).

This "central role" of the Speech or Debate Clause is not implicated in this action, where there are no issues of "intimidation of legislators by the executive" or "accountability before a hostile judiciary." Indeed, because this action involves federal court review of state action, which implicates the Civil War amendments and subsequent legislation, the Speech or Debate Clause has little place in analyzing whether state legislators have legislative immunity with respect to actions affecting federal constitutional rights of petitioner in being removed from office.

Dissenting in *Tenney*, but undisputed, Justice Douglas said [341 U.S. at 382-83]:

> "May they depart with impunity from their legislative functions, sit as kangaroo courts, and try men for their loyalty and their political beliefs? May they substitute trial before committees for trial before juries? * * *
>
> "It is one thing to give great leeway to the legislative right of speech, debate, and investigation. But when a committee perverts its power, brings down on an individual the whole weight of government for an illegal and corrupt purpose, the reason for the immunity ends."

Respondents' arguments in favor of legislative immunity overlook the weightier arguments that the traditional role of federal courts is to decide whether state governmental determinations violate the federal constitutional rights of individuals adversely affected, the purpose of the Fourteenth Amendment and 42 U.S.C. § 1983. *Davis v. Passman*, 422 U.S. 228, 236 (1979); *Webster v. Doe*, 486 U.S. 592 (1988).

Pennsylvania cases cited by respondents support

petitioner. *In re Investigation by Dauphin County Grand Jury (No. 2)*, 332 Pa. 342, 2 A.2d 802, 803 (1938), authorized judicial review of impeachment proceedings to ensure they are within constitutional lines. *Accord, Larsen v. Senate,* 166 Pa.Cmwlth. 472, 646 A.2d 694 (1994), affirmed by the Supreme Court of Pennsylvania in an unpublished order.

Marshall Impeachment Case, 363 Pa. 326, 341-345, 69 A.2d 619 (1949), held that: each member of City Council, sitting in impeachment, was required to be present in order to see and hear witnesses; any member not present during presentation of evidence was disqualified from voting on any charge relating to such evidence; and, an impeachment trial must be conducted in the manner in which common pleas trials are conducted, including as to evidentiary rulings.

Historically, the Penn. Senate has viewed impeachment proceedings as judicial in nature. *See, Proceedings of the Constitutional Convention of 1776*, p. 61; *Proceedings of the Council of Censors, 1784*, p. 74; *Pa. Legislative Journal--Senate*, for 1779 (trial of Judge Francis Hopkinson); *Pa. Legislative Journal--Senate*, February 27, 1794 (trial of Comptroller-General John Nicholson); *Pa. Legislative Journal--Senate*, January 13, 1803 (trial of Judge Addison).

Constitutionally protected interests

Petitioner had both property and liberty interests in both his position as justice of the Supreme Court of Pennsylvania and in not being barred from holding any office of trust or profit in Pennsylvania.

In re Franciscus, 471 Pa. 53, 369 A.2d 1190 (1977), and *Matters of Judges Glancey and Chiovero*, 515 Pa. 201, 527 A.2d 997 (1987), show that Pennsylvania judges have property interests in their positions.

Former Justice of the Peace Franciscus contended that by issuing a suspension order before receiving a recommendation of the Judicial Inquiry and Review Board, the Supreme Court of Pennsylvania had deprived him of his office without due process of law. *Franciscus* held [369 A.2d at 1194]:

> "Here, petitioner's rights have been fully protected by the immediate referral of the matter of the Judicial Inquiry and Review Board. The suspension in the instant case cannot be considered a Final determination as to the right of petitioner to hold his office since the suspension remains effective only until disposition is made by the Board. Thus, petitioner will be granted a hearing, a full opportunity to present evidence in his behalf and to cross examine witnesses against him.
>
> "Footnote 7. In view of the Commonwealth's interest in maintaining the integrity of the judiciary, and because the petitioner will be afforded a full hearing with the opportunity to present evidence in his behalf and to confront the witnesses against him prior to any Final determination affecting his position, we believe that petitioner's constitutional rights to the due process and equal protection of the law have not been violated. See, *Boddie v. Connecticut*, 401 U.S. 371, 378-79 & n.6 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 263 & n.10 (1970). Thus, we find petitioner's argument, that the order of this Court suspending him from his office denied him due of his state and federal constitutional rights, to be unpersuasive."

Glancey is stronger authority, because former Judges Glancey and Chiovero were granted relief under the Due Process Clause of the Fourteenth Amendment. *Glancey* held the due process rights of the two judges were violated when the Judicial Inquiry and Review Board did not give them

specific and categorical notice that the judges' claims of Fifth Amendment privilege in not answering questions concerning their finances, would amount to misconduct warranting the imposition of sanctions. See, 527 A.2d at 1000, 1005.

That Pennsylvania judicial officers have property interests in their positions is so clear that the Supreme Court of Pa. did not bother to address the question in *Franciscus* or *Glancey*, even when granting Judge Glancey relief. This was confirmed later in *Guarino v. Larsen*, 821 F.Supp. 1040, 1056-57 (E.D.Pa. 1992), reversed on other grounds, 11 F.3d 1151 (3d Cir. 1993), which found a judge's property interest rooted in the Pennsylvania Constitution.

Respondents misplace reliance on *In re 1991 Pa. Leg. Reapp. Comm.*, 530 Pa. 335, 609 A.2d 132 (1992), which in turn, relied on *Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698 (1977). *Sweeney* upheld the property interest of legislators in their office, but held it was highly circumscribed. Neither case involved a judicial officer.

Conclusion

Petitioner Rolf Larsen asks the court to grant his petition for a writ of certiorari and to review the August 11, 1998, judgment of the Court of Appeals.

Respectfully submitted,

Cletus P. Lyman
Michael S. Fettner
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040
Counsel for Petitioner